TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 243.

JAMES E. GORMAN, APPELLANT,

vs.

CHARLES E. LITTLEFIELD, TRUSTEE IN BANKRUPTCY OF ALBERT O. BROWN ET AL., COPARTNERS, TRADING UNDER THE NAME OF A. O. BROWN & COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED MARCH 6, 1913.

(22,806)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 16, 1912.

a United States Circuit Court of Appeals for the Second Circuit.

In the Matter of ALBERT O. BROWN et al., Bankrupts; JAMES E. GORMAN, Appellant.

Transcript of Record.

Appeal from the District Court of the United States for the Southern District of New York.

Printed under the direction of the clerk.

1 U. S. District Court, Southern District of New York.

In the Matter of ALBERT O. BROWN et al., Bankrupts; In re Claims of James E. Gorman to Certain Securities, etc.; James E. Gorman, Reclaimant-Appellant.

Statement.

1908.
Novr. 24th. Petitions for reclamation filed.
Decr. 8th. Receiver's Answer to Petitions filed.
1909.
Feby. 6th. Order referring issues to John J. Townsend, Referee, filed.
Jany. 29th et seq. Hearings before Referee.
Decr. 3d. Referee's report filed.
1910.
Jany. 15th. Order of District Court modifying Referee's report filed.
June 20th. Reclaimant's appeal taken.
Assignment of Errors filed.

2 United States District Court, Southern District of New York.

In Bankruptcy.

In the Matter of ALBERT O. BROWN, G. LEE STOUT, EDWARD F. Buchanan, Lewis G. Young, Samuel C. Brown and W. Rhea Whitman, Co-partners, Trading under the Name of A. O. Brown & Company, Bankrupts.

STATE OF NEW YORK,
County of New York, ss:

James E. Gorman, being duly sworn, deposes and says that he is the owner and lawfully entitled to the immediate possession of 250 shares of the capital stock of the Green Cananea Copper Company. That the certificate or certificates of stock representing said 250

shares of the capital stock of the Green Cananea Copper Company are now in the possession and wrongfully detained by Charles E. Littlefield, as Receiver of the above-named bankrupts.

That the alleged cause for the detention thereof according to this deponent's best knowledge, information and belief is that such certificate or certificates of stock were among those found in the office or possession of the bankrupts at the time of their assignment on August 25th, 1908.

3 That the said bankrupts on April 14, 1908, acting as agents or brokers for the deponent, acquired and purchased the 250 shares of the capital stock of the Green Cananea Copper Company, and that on that day deponent paid $2,783.38 in cash to said bankrupts in full and entire payment of the cost of said shares of the capital stock, together with said bankrupts' commission for the purchase of said stock; that on that day also the bankrupts, or their duly appointed agent or manager, in their office in the Railway Exchange Building, in the City of Chicago, State of Illinois, stated to deponent that the bankrupts had purchased for the deponent said 250 shares of the capital stock of the Green Cananea Copper Company, and then, and at that time, specifically asked the deponent whether or not he desired to have the stock transferred into his name; and that at that time deponent decided not to have said shares of capital stock transferred into his name on the books of the Green Cananea Copper Company, but left certificate or certificates of stock representing said shares of capital stock in the possession of the bankrupts.

That the said deponent has demanded delivery of said certificate or certificates of stock of Charles E. Littlefield, as Receiver of said bankrupts, and that said Receiver has refused and still refuses to deliver it to him.

No previous application for this order has been made to any court or judge, except that at a term of this Court held on November 16, 1908, in Room 66, Post Office Building, Borough of Manhattan, City of New York, Hon. Charles M. Hough, judge, holding said court, a petition was presented to this Court which had inadvertently been served upon the attorneys for the Bankrupts herein instead of upon the attorneys for the Receiver, whereupon the order was granted, no one appearing to oppose, but no action has been taken thereon.

4 Wherefore, deponent prays that an order be entered herein directing said Charles E. Littlefield, as Receiver of Albert O. Brown, G. Lee Stout, Edward F. Buchanan, Lewis G. Young, Samuel C. Brown and W. Rhea Whitman, bankrupts herein, to return and deliver the said certificate or certificates of stock to the deponent, or his dutly authorized attorney in fact, and for such other or further order or relief as to the Court may seem just.

JAMES E. GORMAN.

Sworn to before me, this sixth day of November, 1908.

[SEAL.] J. L. COLEMAN,
Notary Public, Cook County, Illinois.

My commission expires July 11, 1909.

(Endorsed:) Petition of James E. Gorman to reclaim 250 shares of stock of the Green Cananea Copper Company, filed November 24, 1908.

5 United States District Court, Southern District of New York.

In Bankruptcy.

In the Matter of ALBERT O. BROWN, G. LEE STOUT, EDWARD F. Buchanan, Lewis G. Young, Samuel C. Brown and W. Rhea Whitman, Co-partners, Trading under the Name of A. O. Brown & Co., Bankrupts.

Walter D. Hines, Solicitor for Petitioner, James E. Gorman, No. 52 William Street, Borough of Manhattan, New York City.
Hays & Hershfield, Attorneys for Receiver, Charles E. Littlefield, 115 Broadway, Borough of Manhattan, New York City.

Motion by Petitioner to Reclaim Securities Owned by Him and Held by the Receiver. Notice for the 30th Day of November, 1908.

Walker D. Hines, Solicitor for James E. Gorman, the petitioner, in support of motion.

6 United States District Court, Southern District of New York.

In Bankruptcy.

In the Matter of ALBERT O. BROWN, G. LEE STOUT, EDWARD F. Buchanan, Lewis G. Young, Samuel C. Brown and W. Rhea Whitman, Co-partners, Trading under the Name of A. O. Brown & Company, Bankrupts.

SIRS: Please take notice that upon the annexed petitions of James E. Gorman (two in number) verified the 24th day of November, 1908, and upon the annexed affidavits of James E. Gorman, Charles T. Atkinson, Oliver A. Olmstead and Clarence Lasier, all verified the 20th day of November, 1908, and upon all the records and proceedings herein, I shall move this Court at a stated term thereof to be held in the United States Post Office Building, in the Borough of Manhattan, City of New York, on the 30th day of November, 1908, at 10.30 o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order or orders directing Charles E. Littlefield, the Receiver of the above-named bankrupts, to return and deliver to said James E. Gorman, or his duly authorized attorney in fact, the certificate or certificates representing the shares of the capital stock of the Chicago Subway Company named in the annexed petitions and the certificate or certificates representing the

shares of the capital stock of the Green Cananea Copper Com-
7 pany named in the annexed petitions, and for such other or further relief as to the Court may seem just.

Dated New York, November 25, 1908.

Yours, etc.,

WALKER D. HINES,
Solicitor for James E. Gorman.

Office & Post Office Address: 52 William Street, Borough of Manhattan, New York City, N. Y.

To Messrs. Hays, Herschfield & Wolf, Attorneys for Receiver, 115 Broadway, New York City, N. Y.

(Endorsed:) Notice of Motion. Filed Nov. 25, 1908.

8 United States District Court, Southern District of New York.

In Bankruptcy.

In the Matter of ALBERT O. BROWN, G. LEE STOUT, EDWARD F. Buchanan, Lewis G. Young, Samuel C. Brown and W. Rhea Whitman, Co-partners, Trading under the Name of A. O. Brown & Company, Bankrupts.

STATE OF NEW YORK,
County of New York, ss:

James E. Gorman, being duly sworn, deposes and says that he is the owner and lawfully entitled to the immediate possession of 100 shares of the capital stock of the Chicago Subway Company, represented by its certificate of stock numbered 3732.

That said certificate of stock is wrongfully detained by Charles E. Littlefield, Receiver of the above-named bankrupts. That the alleged cause for the detention thereof, according to this deponent's best knowledge, information and belief, is that said certificates of stock was among those found in the office or possession of the bankrupts at the time of their assignment on August 25, 1908.

That the said bankrupts obtained possession of said certificate of stock on August 24, 1908; that on that day they purchased the 100 shares of the capital stock of the Chicago Subway Company, as agents or brokers for the deponent, and that on that day the
9 deponent paid $2,035.55 in cash to said bankrupts, that sum being the full and entire cost of said shares of stock, together with said bankrupts' commission for the purchase of such stock; that on that day also the bankrupts, or their duly appointed agent, or manager, in their office in the Railway Exchange Building, in the City of Chicago, State of Illinois, stated to deponent that the bankrupts had purchased for the deponent said 100 shares of the capital stock of the Chicago Subway Company, and then, and at that time, specifically asked the deponent, whether or not he desired to have the stock transferred into his name; and that at

that time the deponent decided not to have said shares of capital stock transferred into his name on the books of the Chicago Subway Company, but left the certificates of stock in the possession of the bankrupts.

That the said James E. Gorman has demanded delivery of said certificate of stock from Charles E. Littlefield, Receiver of said bankrupts, and that said Receiver has refused and still refuses to deliver it to him.

Wherefore, deponent prays that an order be entered herein directing said Charles E. Littlefield, as Receiver of Albert O. Brown, G. Lee Stout, Edward F. Buchanan, Lewis G. Young, Samuel C. Brown and W. Rhea Whitman, Bankrupts herein, to return and deliver the said certificates of stock to the deponent, or his duly authorized attorney in fact, and for such other or further order or relief as to the Court may seem just.

JAMES E. GORMAN.

Sworn to before me this sixth day of November, 1908.

[SEAL.] J. L. COLEMAN,
Notary Public in and for said County and State.

My commission expires July 11, 1909.

10 United States District Court, Southern District of New York.

In Bankruptcy.

In the Matter of ALBERT O. BROWN, G. LEE STOUT, EDWARD F. Buchanan, Lewis G. Young, Samuel C. Brown and W. Rhea Whitman, Co-partners, Trading under the Name of A. O. Brown & Company, Bankrupts.

STATE OF ILLINOIS,
County of Cook, ss:

James E. Gorman, being duly sworn, deposes and says that the attached document, marked deponent's exhibit A, being "Ex." 7, "stock a/c," dated July 31st, 1908, is a true and correct copy of the account sent to him by A. O. Brown & Company on July 31st, 1908, prior to the bankruptcy of said A. O. Brown & Company; and that the same shows that as of said date, and as of the date of June 30th, 1908, prior to the bankruptcy of said A. O. Brown & Company, said A. O. Brown & Company had possession of 250 shares of the capital stock of the Green Cananea Copper Company, which they were holding in their possession on behalf of said deponent. Deponent further says that the attached document marked deponent's exhibit B, being "Ex." 7, "stock a/c," is a copy of the account sent to him by A. O. Brown & Company on
11 Aug. 31st, 1908, after the bankruptcy of said A. O. Brown & Company; and that the same shows that prior to the bankruptcy of said bankrupts, said A. O. Brown & Company had posses-

sion of 250 shares of the capital stock of the Green Cananea Copper Company, which they were holding in their possession on behalf of said deponent; and that said account shows that after the bankruptcy of said bankrupts they held in their possession on behalf of deponent, 250 shares of the capital stock of the Green Cananea Copper Company.

And further deponent sayeth not.

JAMES E. GORMAN.

Subscribed and sworn to before me this 6th day of November, A. D. 1908.

[NOTARIAL SEAL.] J. L. COLEMAN,
Notary Public in and for said County and State.

12 EXHIBIT A.

J. E. Gorman in Account with A. O. Brown & Co., 30 Broad Street.

DR.

					Days.	Interest.
June	30	Balance		$6216.09	31	$32.12
		300 Gold Cons.				
		250 Gr. Can.				
		200 T. O. U. P.				
July	1	Ck.		300.00	30	1.50
	13	100 Gt. No. O.	62⅜	62.50	18	18.75
	25	Grain a/c		500.00	6	.50
	31	Bal. Shorts		18000.00		
		Int. 4½%		26.90		
				31292.99		52.87
July	31	Balance		4500.99		
		300 Gold Cons.				
		250 Gr. Can.				
		100 Gt. No. O.				

CR.

1908.					Days.	Interest.
July	20	100 So. P.	90¼	$9010.50		
		100 Atch.	85¼	8510.50		"
		100 T. O. U. P	46¾	4660.50	11	
		100 "	46¼	4610.50	"	$17.00
	31	Bal. Int.				26.90
		Adj. "				8.97
		Bal.		4500.99		
				31292.99		52.87
July	31	Bal. Shorts:		18000.00		
		100 So. P.	93			
		100 Atch.	87			

E. & O. E.

A. O. Brown & Co.

13 EXHIBIT B.

J. E. Gorman in Account with A. O. Brown & Co., 30 Broad Street.

DR.

1908.				Days.	Interest.
July 31	Bal.		$4500.99	31	$23.25
	300 Gold Cons.				
	250 Gr. Can.				
	100 Gt. No. O.				
Aug. 24	100 Sub.	21¾	2187.50	7	2.54
31	Int. 4%		8.37		
	The following is a memorandum of short stocks and bonds at time of suspension Aug. 25th, 1908, and value of *a* same as if bought at averaged prices between 12: noon and 2: p. m.				
26	100 So. P.	100	10012.50		
	100 Atch.	88	8812.50		
	Int. 4% 5 days		10.45		
	Balance		5807.69		
			$31340.00		$25.79

CR.

1908.				Days.	Interest.
July 31	Bal. Shorts		$18000.00		
	100 So. P.	93			
	100 Atch.	87			
Aug. 21	100 Gt. No. O.	66	6387.50	10	$10.98
24	300 Gold Cons. 6½		1930.95	7	2.25
31	Bal. Int.				8.37
	Adj.				4.19
	The following is a memorandum of long stocks at time of suspension Aug. 25, 1908, and value of same as if sold at the averaged prices between 12: noon and 2: p. m.				
26	250 Gr. Can. 11¼		2783.38		
	100 Sub. 1-3 20½		2035.50		
	Int. 4% 5 days		2.67		
			31340.00		25.79
Aug. 31	Balance		5807.69		

E. & O. E.

14 United States District Court, Southern District of New York.

In Bankruptcy.

In the Matter of ALBERT O. BROWN, G. LEE STOUT, EDWARD F. Buchanan, Lewis G. Young, Samuel C. Brown, and W. Rhea Whitman, Copartners, Trading under the Name of A. O. Brown & Company, Bankrupts.

STATE OF ILLINOIS,
County of Cook, ss:

Charles T. Atkinson, being duly sworn, deposes and says that he is now in charge of the Railway Exchange Building Chicago office of Farson, Son & Company; that he was, during all of the time A. O. Brown & Company maintained an office at the same place, engaged with them.

That James E. Gorman, 1129 Railway Exchange Building, Chicago, had an account with A. O. Brown & Company in their office in the Railway Exchange Building, Chicago. The account was recorded on the books and known as Ex. 7.

That on April 14th, 1908, Mr. Gorman bought two hundred and fifty (250) shares of Greene Cananea stock. Prior to the purchase of the stock Mr. Gorman made inquiry of me if this stock would be carried on margin; I telegraphed to A. O. Brown & Co. to ascertain and received in reply the information that they could not carry the stock on margin, and would buy it only if paid
15 for in full. With this understanding, Mr. Gorman purchased the two hundred and fifty shares of Greene Cananea stock, his credit balance with the house amply providing for the full payment of purchase price. At about this same time I asked Mr. Gorman if he wished the stock formally transferred to his name and certificates delivered, and he replied that that was not necessary in this case, as the stock did not pay dividends, and he might decide to sell, in which event it would be more convenient in making delivery to leave the stock in A. O. Brown & Co.'s hands.

Later on, in fact just a few days before A. O. Brown & Co.'s assignment, Mr. Gorman bought one hundred (100) shares of Chicago Subway stock. This was a purchase made under the condition laid down by A. O. Brown & Co. that no Chicago Subway was to be carried on margin and must be paid for in full. Mr. Gorman ordered the stock purchased under the conditions, his credit balance with the house amply providing for the full payment.

Mr. Gorman was from time to time advised in monthly reports sent by A. O. Brown & Company that the above number of shares of said stocks were held by them for him, he being represented as the owner thereof.

These purchases of Green Cananea and Chicago Subway are, to my knowledge and belief, as definitely the property of J. E. Gor-

man as though he had ordered them transferred to his name and delivered to him by A. O. Brown & Company.

CHARLES T. ATKINSON.

Subscribed and sworn to before me this 6th day of November, 1908.

[NOTARIAL SEAL.] J. L. COLEMAN,
Notary Public in and for said County and State.

16 United States District Court, Southern District of New York.

In Bankruptcy.

In the Matter of ALBERT O. BROWN, G. LEE STOUT, EDWARD F. Buchanan, Lewis G. Young, Samuel C. Brown, and W. Rhea Whitman, Copartners, Trading under the Name of A. O. Brown & Company, Bankrupts.

STATE OF ILLINOIS,
County of Cook, ss:

Oliver A. Olmstead, being duly sworn, deposes and says that in 1907 and 1908 J. E. Gorman, 1129 Railway Exchange Building, Chicago, Ill., had an account with A. O. Brown & Co. of New York, through their branch office in the Railway Exchange Building, 171 Michigan Ave., Chicago. This account was known as Ex. 7. About the middle of the month of April, 1908, Charles T. Atkinson, who was in the employ of A. O. Brown & Co. at their Railway Exchange office, telephoned me at 4 Arcade Commercial National Bank Building, Chicago, where I held the position of one of the Chicago Managers for A. O. Brown & Co., New York, in regard to the purchase of 250 shares of Greene Cananea stock for J. E. Gorman. Mr. Atkinson said that A. O. Brown & Co., New York, insisted that the 250 shares of Greene Cananea stock be paid for in full. A message
17 from A. O. Brown & Co., New York, to that effect was received at the offices of A. O. Brown & Co., in Chicago. I then instructed Clarence Lasier, who had charge of the margin books of A. O. Brown & Co. in Chicago, to carry the 250 Greene Cananea as paid for in full, and that the same was not to be considered of value in figuring protection on any other trades Mr. Gorman might have open or make in the future.

In August, 1908, Mr. Gorman purchased 100 shares of Chicago Subway, and as A. O. Brown & Co. had already refused in other cases to buy this stock unless paid for in full, Mr. Lasier also carried these 100 shares as "paid in full."

Statement of Mr. Gorman's account will show that he sold out some Goldfield Consolidated stock on the same day purchase of the 100 shares of Subway was made, so that his account would be amply protected after payment in full of the 100 shares Chicago Subway and 250 shares Greene Cananea.

It is my opinion that the certificates of Greene Cananea and Chicago Subway referred to are the property of J. E. Gorham.

OLIVER A. OLMSTED.

Subscribed and sworn to before me this 6th day of November, 1908.

[NOTARIAL SEAL.] J. L. COLEMAN,
Notary Public in and for said County and State.

18 United States District Court, Southern District of New York.

In Bankruptcy.

In the Matter of ALBERT O. BROWN, G. LEE STOUT, EDWARD F. Buchanan, Lewis G. Young, Samuel C. Brown, and W. Rhea Whitman, Copartners, Trading under the Name of A. O. Brown & Company, Bankrupts.

STATE OF ILLINOIS,
County of Cook, ss:

Clarence Lasier, being duly sworn, deposes and says that Mr. J. E. Gorman, 1129 Railway Exchange Building, Chicago, Ill., had an account on the books of A. O. Brown & Company, New York, through their office in the Railway Exchange Building, 171 Michigan Avenue, Chicago, during the period of 1907 to the date of said A. O. Brown & Company's suspension, August 25th, 1908.

That Mr. J. E. Gorman purchased through A. O. Brown & Co. in their office in the Railway Exchange Building, 250 shares of Greene Cananea stock, in the month of April, 1908, and 100 shares of Chicago Subway stock, in the month of August, 1908, and the within mentioned stocks were considered as being paid for by me in determining Mr. J. E. Gorman's market protection.

It was on instructions received from Mr. O. A. Olmsted, manager of the Commercial National Bank Building Office, that
19 the said 250 shares of Greene Cananea and 100 shares of Chicago Subway stocks be considered as fully paid for and no credit extended on those stocks.

The undersigned was in the employ of A. O. Brown & Co. at their office, 4 Arcade, Commercial National Bank Building, Chicago, Ill., acted in the capacity to oversee that the stock accounts belonging to clients doing business through the Railway Exchange Building and the Commercial National Bank Building offices be properly protected as to the daily fluctuations of the security market.

CLARENCE LASIER.

Subscribed and sworn to before me this 20th day of November 1908.

[NOTARIAL SEAL.] J. L. COLEMAN,
Notary Public in and for said County and State.

(Endorsed:) Notice of motion. Affidavits and petitions to reclaim property of James E. Gorman. Filed November, 1908.

20 United States District Court, Southern District of New York.

In Bankruptcy.

In the Matter of ALBERT O. BROWN, G. LEE STOUT, EDWARD F. Buchanan, Lewis G. Young, Samuel C. Brown, and W. Rhea Whitman, Co-partners, Trading under the Name of A. O. Brown & Company.

Charles E. Littlefield, Receiver of the above-named bankrupts, answering the petitions of James E. Gorman, respectfully shows to this Court and alleges:

I. Denies any knowledge or information sufficient to form a belief as to the allegations in said petitions contained, except that your respondent admits the institution of bankruptcy proceedings against A. O. Brown & Company, and that he is the Receiver of A. O. Brown & Company and the individual members thereof.

II. The respondent herein specifically denies that there is in his possession the two hundred and fifty shares of stock of the Greene Cananea Copper Company, in said petitions mentioned.

Wherefore your respondent prays that the said petitions may be dismissed.

HAYS, HERSHFIELD & WOLF,
Attorneys for Respondent.

Office and Post Office Address, No. 115 Broadway, Borough of Manhattan, New York City.

21 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Charles E. Littlefield, being duly sworn, says, that he is the respondent herein; that he has read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

CHARLES E. LITTLEFIELD.

Sworn to before me this 7th day of December, 1908.

[SEAL.] ADELE F. SHAW,
Notary Public, Kings County.

Certificate filed in New York County.

(Endorsed:) Answer to petition of James E. Gorman. Filed December 8, 1908.

United States District Court, Southern District of New York.

In Bankruptcy.

In the Matter of ALBERT O. BROWN, G. LEE STOUT, EDWARD F. Buchanan, Lewis G. Young, Samuel C. Brown, and W. Rhea Whitman, Co-partners, Trading under the Name of A. O. Brown & Company, Bankrupts.

SIRS: You will please take notice that pursuant to the
22 designation made by John J. Townsend, Esq., Special Master, the proceeding instituted by James E. Gorman to reclaim property belonging to him now in the possession of the Receiver of the above-named bankrupts, Charles E. Littlefield, which was heretofore on December 7, 1908, referred to said Special Master, will be brought on for hearing before said Special Master at his office, No. 45 Cedar Street, Borough of Manhattan, City of New York, on the 11th day of January, 1909, at 2 o'clock P. M.

Dated, December 28, 1908, 12 M.

Yours, &c.,

WALKER D. HINES,
Solicitor for James E. Gorman, the Petitioner.

Office & Postoffice Address, 52 William Street, Borough of Manhattan, New York City.

To Hays, Hershfield & Wolf, Esqs., Counsel for the Receiver, 115 Broadway, New York City.

(Endorsed:) Notice of Motion. Filed December 1909.

23 At a Stated Term of the District Court of the United States for the Southern District of New York, held in Room 66 in the Federal Building, in the Borough of Manhattan, City of New York, on the 16th day of February, 1909.

Present: Hon. George C. Holt, District Judge.

In the Matter of ALBERT O. BROWN, G. LEE STOUT, EDWARD F. Buchanan, Lewis G. Young, Samuel C. Brown, and W. Rhea Whitman, Individually, and Comprising the Firm of A. O. Brown & Co., and the Firm of A. O. Brown & Co., Bankrupts.

An order having been granted herein on January 6, 1909, requiring creditors of the above named bankrupts and other persons, firms, or corporations, claiming stocks, bonds, securities and other assets, or the proceeds thereof, in the possession, custody or control of the receiver or trustee herein, to file their claims against the said stocks, bonds, securities and other assets, or the proceeds thereof.

On reading and filing the said order to show cause, dated January

6, 1909, the petition of Charles E. Littlefield, verified January 6, 1909, and all the papers and proceedings had and taken herein, and on due proof of due service thereof.

On motion of Hays, Hershfield & Wolf, attorneys for the receiver and trustee herein, it is

24 Ordered that all creditors of the above named bankrupts and all persons, firms, or corporations claiming stocks, bonds, securities, or any other assets, or the proceeds thereof, in the possession, custody or control of the receiver or trustee herein, be and they hereby are directed to file their claims thereto, duly verified in the office of the Clerk of this Court, on or before the 1st day of March, 1909; and it is further

Ordered that any and all creditors or other claimants to the said stocks, bonds, securities and other assets, or the proceeds thereof, (who shall not file such claim to the said stocks, bonds, securities and other assets, or the proceeds thereof), asserting their right, title or interest therein and thereto, on or before said 1st day of March, 1909, be and they hereby are forever barred from making claim or asserting any right, title, or interest in or to the said stocks, bonds, securities and other assets now in the possession, custody or control of the receiver or trustee herein, or the proceeds thereof, and said creditors and claimants are, in default thereof, hereby forever enjoined and restrained from making, claiming, or asserting any such right, title or interest therein and thereto; and it is further

Ordered that the determination of all rights, titles and interests, if any, in and to any and all of the said stocks, bonds, securities and other assets, or the proceeds thereof, made as aforesaid, be and the same hereby is referred to Hon. John J. Townsend, who is hereby appointed Special Master for that purpose, to hear and determine the rights of all such creditors and claimants, including the receiver and trustee in bankruptcy herein; and the said Master is directed in all respects to adjust, determine and adjudicate the rights,

25 titles, interests, equities, claims and liens therein and thereto, and report to this Court his determination thereon.

GEO. C. HOLT,
United States District Court Judge.

A true copy.
THOMAS ALXEANDER, *Clerk.*

To all parties interested herein:

Please take notice that the within is a copy of an order this day duly made and entered herein in the office of the Clerk of the United States District Court for the Southern District of New York.

Dated, New York, February 16, 1909.

HAYS, HERSHFIELD & WOLF,
Attorneys for Trustee.

Office and Post Office Address, No. 115 Broadway, Borough of Manhattan, New York City, N. Y.

(Endorsed:) Order directing creditors to file claims, etc., and notice of entry thereof filed Feby. 16, 1909.

26 United States District Court, Southern District of New York.

In the Matter of ALBERT O. BROWN et al., Bankrupts.

SIRS: Please to take notice that the reclamation proceeding or claim heretofore made and filed herein will be brought on for hearing before Hon. John J. Townsend, Referee in Bankruptcy, at his office No. 45 Cedar Street, in the Borough of Manhattan, City of New York, on the 10th day of November, 1909, at 10 o'clock in the forenoon, and a motion will then and there be made to dismiss such proceedings, and for such other and further relief as to the Court may seem just and proper.

Dated, New York, October 11, 1909.

Yours, &c.,

HAYS, HERSHFIELD & WOLF,
Attorneys for Trustee.

Office and Post Office Address, No. 115 Broadway, Borough of Manhattan, City of New York.

To the following claimant and his attorney: James E. Gor-
27 man, appearing by Walker D. Hines, 52 William Street, New York City, as Attorney.

(Endorsed:) U. S. District Court, Southern District of New York. In the Matter of Albert O. Brown, et al., Bankrupts. Notice of Hearing. Hays, Hershfield & Wolf, Attorneys for Trustee, No. 115 Broadway (United States Realty Building), Borough of Manhattan, New York City.

Before Hon. John J. Townsend, Special Master.

Reclamation of JAMES E. GORMAN.

NEW YORK, *January 29th*, 1909, at 11 a. m.

Present:

Messrs. Hays, Hershfield & Wolf, by Mr. Wolf, for the Trustee.
Walker D. Hines, by Jarvis P. Carter, for the Petitioner.

Mr. CARTER: I move that the petition of James E. Gorman to reclaim 100 shares of the capital stock of the Chicago Subway Company, represented by certificate of stock No. 3732 be amended by correcting in the fifth line, the third paragraph thereof, the amount $2,035.55 to make it read $2,187.50 and also to amend the petition so as to make it run to the Trustee as the successor of the Receiver.

The MASTER: In the absence of any objections I grant the motion.

28 JAMES E. GORMAN, the Petitioner, being called as a witness in his own behalf, being first duly sworn by the Master, testified as follows:

Direct examination by Mr. CARTER:

Q. Mr. Gorman, your full name, your address, your age and your occupation?

A. James E. Gorman, Railway Exchange Building, Chicago, Illinois, Age 45, Freight Traffic Manager, for the Atchison, Topeka & Santa Fe Railway Company.

Q. Have you ever had any dealings with the firm of A. O. Brown & Company?

A. I have.

Q. During what period?

A. During all of the time they had offices in Chicago. Sometime in 1907, until they failed in August, 1908.

Q. And at which Chicago office did you deal?

A. The Railway Exchange Office.

Q. And during your dealings with A. O. Brown & Company through that office, did you deal with the same agent of A. O. Brown & Company?

A. Yes, sir. Practically all my dealings were with Mr. Charles T. Atkinson. In his absence at one time, I had transactions with Mr. Barrell.

(The MASTER:)

Q. One transaction?

A. One, in the absence of Mr. Atkinson.

Q. What was the occasion of Mr. Atkinson's absence, if you know?

A. He was on a vacation as I understood it.

Q. And these transactions with Mr. Atkinson ran from the opening of the office in the Railway Exchange Building, in the beginning of 1907 until August, 1908, or until the time of the assignment?

A. Yes, sir.

29 Q. Did you have any negotiations with Mr. Atkinson on behalf of A. O. Brown & Company, with respect to 250 shares of Greene Cananea Stock?

A. I did.

Q. Will you state the time at which that transaction took place, and state in full the nature of the transaction?

A. The transaction took place on the 14th of April. On that day, or possibly——

Q. What year?

A. 1908. On that day, or possibly the day before I saw Mr. Atkinson and told him I wanted to buy this Greene Cananea Stock, and he said they would have to buy it outright, that the house would not carry that stock on margin, and I gave him an order to buy 250 shares of Greene Cananea outright, they having sufficient of my funds on hand at the time to pay for it outright. I know at the time he reported to me that he had purchased the Greene Cananea

Stock, he told me the price at which he purchased it, and asked me if I wished him to arrange to have the certificates made out in my name, transferred to me on the books, and the certificates delivered to me, and I said, "No, it isn't necessary." I told him he might keep them, and I would later on tell him what to do with them. And that transaction remained in that shape until the firm failed.

Q. Had you had any other transactions of this kind, this general description, prior to that date with Atkinson?

A. Yes, sir, in 1907 I concluded I wanted to buy some Chicago Subway Stock, and I was doing practically all my business of that character with Mr. Atkinson, and I gave him the order.

Q. How many shares?

A. 100 shares of Chicago Subway Stock, I think it was in June, 1907, that he took the order in the usual course, and called
30 me up later to say that the house would not execute that order on margin, and that the bank would not take Subway, and I would have to pay for it outright, and I did want it, and I ordered him to purchase it on those terms, I having sufficient funds in their hands with which to make the purchase. I carried that along until about the time, or rather they carried it, until about the time I bought the Greene Stock, when it was sold out. The original shares of the Chicago Subway was sold about the time of the purchase of the Greene. Now, I had other transactions at the time, running through,—these are not the sole transactions with the firm; I cannot recite all the transactions.

Q. At the time of that previous purchase of the Chicago Subway stock, in June, 1907, did you have the stock transferred in your name?

A. No, sir. The same process exactly; he reported the purchase, and asked me if I wanted the certificates, and I said no, you keep them, and I will sell them out, sometime, or tell you what to do with them. I sold it without having it transferred to my name.

Q. At the time that you ordered the purchase of the Greene Cananea Stock, what balance did you have in your favor with A. O. Brown & Company?

A. I don't know what balance I had with them. I left that matter with Mr. Atkinson as to my balance, at all times, and I talked with him when I wanted to conduct any business, and understood I had sufficient money to conduct whatever transactions I wish to. I didn't exceed my ability to conduct the transactions under the conditions as he named them.

31 Q. You stated that at the time of the purchase of the Greene Cananea stock you sold out 100 shares of Chicago Subway stock, which you had purchased before?

A. Yes, sir; I purchased it in June, 1907, and in April, 1908, at about the time I ordered the Green Cananea I ordered them to sell that, which they did.

Q. In making that order to sell the 100 shares of Chicago Subway stock, did you have any particular object in view?

Mr. WOLF: I object to that as incompetent, irrelevant and immaterial.

The MASTER: Objection sustained.

Q. Did you, in ordering that sale of 100 shares of Chicago Subway stock, in April, 1908, do so in order to supply from the returns received thereon, sufficient funds to pay for the 250 shares of Greene Cananea which you ordered at the same time?

Mr. WOLF: I offer the same objection.
The MASTER: Objection sustained.
Mr. CARTER: I take an exception.

Q. Did you order the sale of 100 shares of Chicago Subway stock, previously bought by you in 1907, on or about the 14th of April, 1908?

A. Yes,—now may I state how that happened?

Q. Will you state in full any other incidents of the transaction of the purchase of the 250 shares of the Green Cananea stock, that took place between you and Mr. Atkinson in April, 1908?

A. Yes, sir. I had been West, and come back with certain information, and I said to Mr. Atkinson, "Now I want to buy Greene Cananea, and Goldfield, and I want to buy all I can, and I will close out these other things which I have been carrying," and we talked that over, and the result of our talk was that we both agreed
32 that I could buy 250 shares of Greene Cananea outright, and 300 shares of Goldfield Consolidated outright. They were bought. I closed out 100 shares of Chicago Subway, which I had previously bought, and paid for outright. I also closed out a margin trade on 100 D. & R. G. common, on margin,—this was about Easter time,—there was some holiday coming in and the market was rather slow.

By the MASTER:

Q. What holiday?

A. Good Friday, for example, intervened, and the market was rather slow, and we talked over my closing out 100 shares of Atchison, common, that I had on margin, and he said that wasn't necessary, that if he closed out on these other two it would give them sufficient funds to cover the purchase I was to make.

Q. These transactions took place at the same time, in April, 1908?

A. Yes, sir. Their office is in the same building with us, and I was in the habit of walking in there every day, and I may have talked to him on the 13th of April for all I know now, but the purchase was made on the 14th, and the Subway was sold out on the 15th, and the D. & R. G. about that time.

By Mr. CARTER:

Q. And this Greene Cananea Copper purchase, so far as you are concerned, remained in precisely the same situation from that time until the assignment?

A. Yes, I supposed it was mine; I supposed it was there, and when I heard they had assigned, I wrote the Receiver and asked him

to send those certificates, and explained to him that they belonged to me.

33 Q. Did you have any subsequent transactions with A. O. Brown & Company with respect to the purchase of any other 100 shares of the Chicago Subway stock?

A. Yes, I did.

Q. When was that?

A. I think it was on the 24th of August, 1908.

Q. At that time with whom did you deal directly?

A. Why, with Mr. Barrell.

Q. Do you remember what his first name was?

A. No, I know him very well, but I don't happen to know his first name.

Q. Was he in the same office?

A. Yes, in the same office. He was there at all times.

Q. Had Mr. Barrell, to your knowledge, been in that office as one of the employés or agents of A. O. Brown & Company from the time they opened the place until the date of the assignment?

A. Yes, every one in that office had gone from Findlay, and Barrell's to A. O. Brown & Company, Mr. Atkinson, and Mr. Barrell, and all hands had gone bodily to A. O. Brown & Company.

Q. Early in 1907?

A. Yes.—Albert M. Barrell, is his name. Mr. Atkinson was away, and I wanted some Chicago Subway, and I went down stairs, and finding Mr. Barrell——

Q. Will you state fully your transaction with Mr. Barrell at that time?

A. Why I had it?

Q. Yes, why you had it?

A. Why, I had the transaction with him specifically, and not with Mr. Atkinson, with whom I had been accustomed to trading.—Mr. Atkinson was away on a vacation, and I wished to get 100 shares of Chicago Subway, and in the absence of Mr. Atkin-

34 son, I conducted the negotiations with Mr. Albert M. Barrell. I was the owner of 300 shares of Goldfield Consolidated stock, which they held for me.

Q. And was that owned by you outright, or was that on margin?

A. It was owned by me outright. They had refused to purchase it for me on margin, and I had paid for it out of the funds belonging to me, already in their possession.

Q. So that that transaction was similar to this in question here, the 250 shares, and the 100 shares——

A. I told Mr. Barrell to sell 300 shares of Goldfield which belonged to me, which he was holding for me, and having sold it to try to buy 100 shares of Chicago Subway.

Q. How many shares of Goldfield did you have?

A. 300.

Q. Those were the ones you bought in April?

A. Yes, sir.

Q. You sold out enough shares to put yourself in funds to buy mining stock?

A. I sold Goldfield, and told them to buy Subway, which he did. He reported it to me, told me the transaction and the price, and the New York office,—I never heard from them on it, I don't know whether they had carried out their transaction on it or not, until I got a statement from the Receiver, after he had been there some time.

Q. The date of that transaction between you and Mr. Barrell was August 24th, 1908?

A. August 24th, 1908.

Q. Which was about a day prior to the assignment of A. O. Brown & Company?

A. Yes, sir, about a day.

35 Q. And you received no statement or confirmation, of that purchase until after the assignment?

A. Well, I never got a confirmation of that purchase from the New York office until after the assignment, when the Receiver, Mr. Littlefield, sent me a statement showing me how my account stood, some time in September. I was relieved to find that they had some record of it in New York. I was not sure up to that time that they had a record of it.

Q. Had you been notified of the confirmation of the purchase by the Chicago office?

A. Yes, sir.

Q. When did you receive that notice?

A. Of the purchase, perhaps the 25th or 24th. Before my following transaction, the Chicago office confirmed it on a slip. That slip always bore the notation that the New York office would confirm by mail. The confirmation by mail did not come, which made me a little uneasy, until I got the letter from the Receiver.

By the MASTER: Did they confirm the purchase, or the sale?

A. Both.

Q. Have you got that slip?

A. I am not sure that I have.

Mr. CARTER: I offer in evidence two slips, one dated August 22nd, 1908, covering 100 shares of Subway.

Same admitted and marked exhibit 1-A.

And another slip dated August 22nd, 1908, covering 200 shares of Gold Con.

Same received and marked exhibit 1-B.

36 By Mr. WOLF:

Q. This statement of July 31st is correct, I presume, Mr. Gorman?

A. I do not know.

Q. Look at it and see?

A. You mean correct as to figures?

Q. Yes.

A. I don't know.

Q. How long did you have it in your possession?

A. I don't know.

Q. From July 31st?

A. About that time.

Q. Suppose you look at it and see if it represents the transactions between you and A. O. Brown & Company?

A. I don't know that it refers to the figures, I know where it says the main transaction. I don't raise any question about that. I don't understand these interest items now, and never did.

Q. This account shows the balance due from A. O. Brown & Company as $4,500.99, is that right?

A. Is it right?

Q. Yes?

A. I never questioned it.

By the MASTER:

Q. Does it correctly show the purchase or sales?

A. Yes, sir.

Q. Does it correctly show the stock of which you were the owner, and which they had on hand, if any—look at it (passing paper to witness)?

A. It says, as I understand it, on hand July 31st, Goldfield Consolidated, 250 shares Greene Cananea, and 100 Northern Ore.

Q. And the balance in your favor is $4,509.99?

A. Well, I would not read it that way. I have always sup-
37 posed it showed I owed them; not a balance in my favor, a balance, but against me.

Q. The statement also shows you were carrying other accounts, did it not?

A. Yes, sir.

Q. The statement shows you were carrying short accounts?

A. Yes, sir.

Q. 100 of Southern Pacific, and 100 of Atchison?

A. Yes, sir.

Q. 100 of Southern Pacific at 93, 100 Atchison at 87?

A. Yes, sir.

Q. After July 31st, the only transactions that you had were the purchase of 100 Subway at 23¾, is that right, and the sale of the Great Northern Ore, on August 21st, the certificates at $66.00 and the sale on August 24th of 300 shares of Goldfield Consolidated at 6½?

A. I believe that is correct.

Q. These are the transactions after July 31st?

A. Yes, sir.

Mr. CARTER: I wish to have marked for identification the statement of July 31st, 1908.

Same was admitted and marked.

By Mr. CARTER:

Q. Mr. Gorman, you stated that you understood that this item of $4,500.99 represented the balance which you owed them at the time?

A. Yes, sir.

Q. What was the balance owed upon?

A. It was the balance due them on the purchase of 100 Great Northern Ore.

Q. Mr. Gorman, when you purchased 100 shares of Great Northern Ore, on July 1st, 1908, will you state briefly the transac-
38 tion you had with Mr. Atkinson, or A. O. Brown's representative?

A. Yes, I told him to buy me 100 shares of Great Northern Ore—that was all there was to it. It was understood it was a margin transaction, and he made——

Q. He made no statement to you that they would not buy it on margin?

A. No.

By Mr. WOLF:

Q. How about the Southern Pacific and the Atchison—were they margin transactions?

The WITNESS: Yes, sir.

By Mr. CARTER:

Q. Now, Mr. Gorman, did you in receiving these balance sheets from A. O. Brown & Company, from New York, did you understand at any time just what was represented by the figures on these sheets?

A. I understood some of the items; I didn't understand all of the items. I cannot look at that sheet, as many trades as I have had, now, and have had in the last ten years, I do not understand it.

Q. Did you have any transactions whatsoever directly with the New York office?

A. I never had any transactions at any time with the New York office of A. O. Brown & Company. I never met any member of the firm, and I never wrote a letter to any member of the firm, nor did they ever write me a letter. I only knew the Chicago people, and I gave them my business because I did know the Chicago people.

Q. You always dealt with these Chicago people as representatives of A. O. Brown & Company?

A. Yes, sir; they were the only people connected with A. O. Brown & Company that I knew.

39 The REFEREE: The stenographer's minutes, and the expense of this hearing and subsequent hearings hereon, I direct shall be paid by the petitioner in the first instance, subject to equitable distribution by final order.

Adjourned to January 30th, 1909, at 12 noon.

Before Hon. John J. Townsend, Special Master.

Adjourned Hearing.

NEW YORK, *January 30th*, 1909—at 12 noon.

Present:

Walker D. Hines, by Mr. Jarvis P. Carter, for the Petitioner.
Messrs. Hays, Hershfield & Wolf, by Mr. Wolf, for the Trustee.

JAMES E. GORMAN, recalled to the stand.

Direct examination continued by Mr. CARTER:

Q. Did you receive any written notice from the New York office concerning the purchase of 250 shares of Greene Cananea stock on April 14th, 1908, for your account?

A. Yes, sir.

Q. Have you those notices at the present time?

A. I have not.

Q. Where are they?

A. I destroyed them, shortly after, about the time I received them; it was my habit to do that.

Q. Are you positive that you destroyed them in the Spring of 1908?

40 A. Yes, sir.

Q. Did you receive any written notices concerning the sales at about the same time for 100 Chicago Subway, and 100 Denver Rio Grande?

A. Yes, sir.

Q. Have you those notices?

A. I have not.

Q. What became of those?

A. I destroyed them in the same way.

Q. In trading with A. O. Brown & Company, in any trade that you made with them, on margin, was there any distinct understanding between you and them as to margin or what precentage of margin you must maintain?

A. No, sir.

Q. What was your habit with reference to margin, payment of margin?

A. All my margin calls came to me from Mr. Atkinson. He would tell me that the house required $100 margin, and I would produce it and give it to him. He called for different amounts at different times, $15,000, $7,000, $700. I never refused payment for what he called; whatever amount he called for I paid promptly always.

Q. It was understood between you both that all the margin which you put up was in cash?

A. Yes, sir, always.

——— ———.

Subscribed and sworn to before me this — day of ——, 1909.

——— ———.

41 THOMAS B. BATES, being recalled in this proceeding, and being first duly sworn by the Special Master, testified as follows:

Direct examination by Mr. CARTER:

Q. Will you state your full name and age?
A. Thomas B. Bates——
Q. And your business?
A. Accountant, age 54 my next birthday.
Q. And your occupation at present?
A. Employed by the Receiver, Mr. Littlefield.
Q. The Trustee of A. O. Brown & Company?
A. Yes, sir.
Q. Prior to the Trusteeship, were you employed by him while he was Receiver, by Mr. Littlefield?
A. Yes, sir.
Q. And prior to that time you were connected with A. O. Brown & Company?
A. Yes, sir.
Q. In what capacity?
A. As head bookkeeper.
Q. In the New York office?
A. At 30 Broad Street, yes sir.
Q. I hand you this document (handing a loose leaf ledger to the witness) and I ask you to state what that is, if you can?
A. (Witness turning to a particular page.) This is the account of J. B. Gorman, with A. O. Brown & Company, the ledger account.
Q. Running between what dates?
A. March 31st, 1907, and the last entry here, August 31st, 1908.
Q. That is the New York ledger account?
A. New York, yes, sir (referring to ledger No. 9, the account known as E-X-7).
Q. Can you say from that account how much cash balance there was either in favor of, or against Mr. Gorman, after the
42 sale on April 15th, of 100 shares of Chicago Subway—or does that account show the sale on April 15th, 1908, the sale for Mr. Gorman, of 100 shares of Chicago Subway, and 100 of Denver & Rio Grande?
A. On April 18th, it shows a sale of 100 Subway, at 18, credit $1,787.50.
Q. And on April 20th?
A. Sale of 100 Denver & Rio Grande at 20, and a credit of $1,985.50.
Q. Immediately after that sale what was the relation between J. E. Gorman and A. O. Brown & Company—does that book show?
A. Yes, sir.

By the MASTER:

Q. What was the cash balance?
A. A debit balance of $6,182.82.
Q. After the sale of the two securities you mention?
A. Yes, sir.

Q. What do you mean by debit, was there a cash balance in favor of Mr. Gorman?

A. No, against him.

By Mr. CARTER:

Q. Will you state does that ledger account show the purchase for Mr. Gorman on April 14th, 1908, of 300 shares of Goldfield Consolidated, and 250 shares of Greene Cananea?

A. Yes, sir.

Q. Will you state how much those securities cost together?

A. $3,859.38.

Q. Now, if that amount were deducted from the amount of the cash balance you have just stated, what would be the result?

43 A. $2,323.45.

Q. A debit balance against Mr. Gorman?

A. Yes, sir.

Q. At that time was Mr. Gorman long 100 shares of Atchison?

A. Yes, sir.

Q. And so far as it appears from the books, that 100 shares of Atchison was held by Mr. Gorman on margin?

A. Yes, sir, he did.

Q. At that time it was shown by the books that Mr. Gorman had a credit of 100 shares of Atchison, and a debit balance of $2,323.45, is that correct?

A. Yes, sir.

Q. Now, this book or this document shows a cash balance as between Mr. Gorman and A. O. Brown & Company, after the sale of 100 shares of Great Northern—or does that book show the sale for Mr. Gorman on August 21st, 1908, of 100 shares of Great Northern Ore?

A. Yes, sir, at 66, with a credit of $6,587.50 as the result of the sale.

Q. Now, does this account show a sale on August 24th, for Mr. Gorman, of 300 shares of Goldfield Consolidated, and at what rate, if it does?

A. Yes, it shows a sale of 300 Goldfield Consolidated, at 6½.

Q. And the amount?

A. $1,930.95.

Mr. CARTER: I now move to strike out that inquiry as to the Great Northern Ore stock.

The MASTER: Strike it out—take out the sale of August 21st, 1908, of one hundred shares of Great Northern Ore.

Q. Does that book show the purchase on August 24th, 1908, of 100 shares of Chicago Subway, and if so, at what rate?

44 A. Yes, sir, purchased at 21¾ with a charge of $2,187.50.

Q. Will you state the credit balance of that account after those respective sales and purchases?

Mr. WOLF: I object to that on the ground that the computation is impossible, unless counsel instructs the witness how he is to figure the short account.

The MASTER: Objection overruled, and I will direct the witness to add any date he thinks will correctly state the case.

Mr. WOLF: I object to the computation of anything which is not on the ledger.

The MASTER: Objection overruled.

Mr. WOLF: Exception.

Q. Will you state, Mr. Bates, that this does not show the amounts we have asked you without further computation?

A. Don't show what amount?

Q. These calculations you have just made, or the one you have been asked for, as to the amount of balances and cash there were on April 14th, 1908, and August 24th, 1908?

A. The books do show the figures; I go away back in April; I haven't given any figures here so far.

By the MASTER:

Q. Do the books show the sale of 300 shares of Goldfield stock?

A. Yes, sir.

Q. And do they show the purchase of 100 shares of Chicago Subway stock on August 24th?

A. Yes, sir.

By Mr. CARTER:

Q. Do they show the cash balance as between Mr. Gorman and A. O. Brown & Company after the sale of 300 shares of
45 Goldfield Consolidated on August 24th, 1908, but prior to the purchase of the 100 shares of Chicago Subway on August 24th, 1908?

A. I do not know whether that purchase was prior or not.

Q. Do they show that amount. I want to find out if they show it?

A. You want me to cut out this August 21st item?

By Mr. WOLF:

Q. Start in July 31st, and tell me what the condition of the account shows?

A. A debit balance of $4,500.99.

Q. That is what Gorman owed A. O. Brown & Company, is it not?

A. Yes, sir.

Q. Give us the other side of the account.

A. You want me to give you what securities he had on hand?

Q. Yes.

A. Gorman was long 300 Goldfield Consolidated, and 250 Greene Cananea, and 100 shares of Great Northern Ore.

Q. Though he owed them $4,500, he had those securities in his possession?

A. Yes, sir.

Q. He had 650 shares of stock which A. O. Brown & Company owed Mr. Gorman?

A. Yes, sir.

Mr. CARTER: I object to the question and answer that Brown owed

Gorman for these 650 shares on the ground that it is immaterial, irrelevant and incompetent.

The MASTER: Objection overruled.

Mr. CARTER: Exception.

46 The WITNESS: On July 31st, there was a credit balance arising from the short sales of $18,000, represented by prior short sales, 100 shares of Southern Pacific at 93, and 100 shares of Atchison at 87, they were figured down to the market valuation as of this date, July 31st.

Q. On July 31st, to complete the statement of account as of that date, Mr. Gorman was entitled to a credit on account of short sales of $18,000, and he owed A. O. Brown & Company 100 shares of Southern Pacific, and 100 shares of Atchison, and on July 31st were valued as follows?

A. 100 shares Southern Pacific at 93, 100 of Atchison at 87.

Q. Now, that is a complete statement of the account as of July 31st?

A. Yes, sir.

Q. Let us have the transactions occur-ing in August?

A. He bought 100 shares of Chicago Subway at 21¾.

Q. What was the adjustment of interest August 31st?

A. The adjustment of interest was $8.37.

Q. Let us have the sales during August?

A. Sold 100 shares of Great Northern Ore at 66—$6,587.50, 300 Goldfield Consolidated, $1,930.95.

By Mr. CARTER:

Q. Mr. Bates, after the sale of August 21st, 1908, of the 100 shares of Great Northern ore, how much cash balance remained in favor of Mr. Gorman, if any, after this sale of Great Northern Ore?

A. $2,086.51.

47 Q. Which was the cash balance on hand in favor of Mr. Gorman prior to the purchase of the 100 shares of Chicago Subway, and the sale of 300 shares of Goldfield Consolidated?

A. Yes, sir.

Q. What was the cash balance after the sale on August 24th, 1908, of 300 shares of Goldfield Consolidated, and the purchase on that day of 100 shares of Chicago Subway?

A. You mean the cash balance, eliminating this $18,000?

Q. Yes.

A. $1,829.96.

Q. And that amount, $1,829.96, represents the margin left over on August 31st, as the margin of 100 shares of Southern Pacific, and 100 shares of Atchison?

A. I think it does.

Q. Is there anything in this account to show whether the 300 shares of Goldfield Consolidated, and the 250 shares of Greene Cananea, and the 100 shares of Great Northern Ore,—to show any distinction between those securities,—anything on the books as to the manner in which they were held?

A. As to whether they were held on margin?
Q. Yes.
A. I don't see anything.
Q. In the general running accounts of customers did you make any distinction, or can you, of stocks held outright, and stocks which are held on margin?
A. Did we ever make any distinction in A. O. Brown & Company.
Q. I mean to say if some of those stocks were held on margin, and others were not, there is no distinction shown in that book?
A. No.

Q. Do you know of any distinction where there was
48 a running account,—how could you make the distinction?
A. There would be a notation on there, of some kind.

Q. You are positive of that?
A. That is what I would do if I kept the books.

By the MASTER:

Q. Is there anything on the face of that account to show whether the stocks were held by margin, or had been paid for?
A. No, sir.

By Mr. CARTER:

Q. Nothing in any of your books that would show that?
A. Not on this book.
Q. Are there in any other books in New York, which dealt with this account?
A. Yes, sir.
Q. Will you please produce these books?
A. Margin slate?
Q. Did you keep a margin slate in New York, of the Chicago accounts?
A. Yes, sir.
Q. Please produce that?
A. Yes, sir.
Q. You state that the margin slate would show that fact?
A. That it would show these facts?
Q. That it would show whether they were purchased outright, or were not?
A. Well, it is possible, if he were considering these as paid for, and not considering them as margins on any of the other transactions, he would need to put in the price of them, so as to figure them in in the regular margin.

49 Q. It would be shown on the margin slate, if anywhere?
A. Yes, sir.

Q. I wish to ask you, Mr. Bates, if you have in your possession the telegrams which were demanded in the subpœna duces tecum addressed to you?
A. I don't know. There may be some upstairs; we have a lot of rubbish scattered all over the place. We haven't had time to sort it out.
Q. Will you do so?

A. If Mr. Littlefield wants me to do so, otherwise I will not tackle it.

Q. Sent from the Chicago office and the main office?

A. Yes, sir.

Q. I demand that you produce those telegrams. Have you in your possession the Chicago blotter ledger which would cover the account of James E. Gorman?

A. We haven't seen any of the books from Chicago.

Q. Do you have it now in the New York office in your possession?

A. It may be in the room.

Q. Look for it between now and Monday?

A. Yes, sir,—you want the blotter and the ledger?

Q. What is known as the Chicago blotter ledger or blotter and ledger?

A. We have both.

Q. Either, or both, if there are three books; and also telegrams which are stated in the subpœna. Those telegrams which are called for by the subpœna, are telegrams from the Chicago Railway Exchange office to the New York office, ordering Greene Canaea in April 14th, 1908, and inquiring whether it could be purchased on margins, and the reply to that stating it could not be, but would have to be purchased outright. And also other telegrams which are requested.

Q. Do you know as a matter of fact whether A. O. Brown & Company, when they had securities of a given kind in their hands, some of those securities being owned and paid for by their customers, and others, were held by them on margins for their customers,—whether they were in the habit of putting all those securities in one given spot, or used any discrimination in making loans, and keeping those securities?

A. Yes, sir.

By the MASTER:

Q. Let me understand that. What was their custom or course of business, in regard to keeping separate the stocks paid for outright, and the stocks only held on margin?

A. I think Mr. Rhoades can answer that better than I.

Q. As far as you know was there any distinction?

A. I know there has been a distinction. I know a friend of mine that had them buy and after I requested Mr. Rhoades to put them in a box and he did so. I think there were other cases of that kind.

Q. Except where there was such a request, you think their ordinary course was not to distinguish?

A. Yes, sir, I think so.

By Mr. CARTER:

Q. Can you tell me what member of the firm of A. O. Brown & Company, had charge of the Chicago business. Who was in direct supervision of the Chicago office?

A. Well, we all had our particular part of it to do.

51 Q. What member of the firm?

A. Mr. Whitman,—that is the clerical part of the business.

The MASTER: He asks with respect to the Chicago business.

The WITNESS: Yes, sir.

Q. What member of the firm of Brown & Company had general supervision for A. O. Brown & Company with respect to the deliveries made of stocks?

A. Mr. Rhoades had charge of that.

Q. What member of the firm was he?

A. He wasn't a member of the firm.

Q. Did some member of the firm have general charge of the New York office?

A. Whitman—I mean the clerical department.

The MASTER: He asked you who had charge of the delivery of stocks, what member of the firm?

A. There is no member of the firm,—Mr. Rhoades.

Q. Did Mr. Whitman have entire charge of all the business done in the office at 30 Broad Street?

A. It was done under his supervision. That particular part of the business was in charge of Mr. Rhoades. He looked after that, he locked the box, took it over to the bank.

The MASTER: Who did he get his orders from?

The WITNESS: He received his orders from Mr. Whitman.

Mr. CARTER: I ask to have the account of James E. Gorman in ledger No. 9 marked for identification.

Same was marked for identification exhibit 3.

Subscribed and sworn to before me this — day of ——, 1909.

—— ——.

52 JAMES E. GORMAN, recalled:

Direct examination continued by Mr. CARTER:

Q. Mr. Gorman, at the time of the assignment of A. O. Brown & Company, did you have any negotiations with any one in the Chicago office of A. O. Brown & Company whatsoever?

A. Yes, sir. When I read of the assignment I went into the office, and all was confusion and excitement, so many people were there that I left. I went back later in the day, when I saw Mr. Stewart Barrell. He said come in to-morrow morning and maybe I can tell you something.

Q. What date was that?

A. It must have been the next day. He told me when I went back that my open account had been closed out. Under the rule, that my open account, on account of the failure, had been closed out.

Q. Under the rule?

A. Yes, sir; which, as he stated it at the time——

Q. What did Mr. Barrell understand that expression to mean?

Mr. WOLF: I object to that as a conclusion, and irrelevant and immaterial.

The MASTER: Objection sustained.

By Mr. WOLF:

Q. Did you see Mr. Barrell after the assignment had been made?

A. Yes, sir; I assumed it was an assignment when the trouble come, yes, sir.

Q. After the legal difficulty?

A. Well, when the newspapers published that A. O. Brown & Company had failed, everybody headed for A. O. Brown & Company's office, I amongst them—there were so many people, that I felt sorry for them and all the rest of the boys; after the ex-
53 citement had died down he said to me, "If you like these trades you can make them elsewhere; your open trades have been closed out under the rule."

Q. You never received any word from the Assignee or the Receiver that such was the fact; that it had actually been done?

A. No.

Q. You never had any talk with them about it?

A. Yes, sir.

Q. About them closing out the open trade?

A. Why, that went without saying.

The MASTER: He is asking you whether you ever got any information such as Barrell gave you—did you ever get anything like that from Mr. Littlefield, oral or written?

A. I cannot answer except to tell you what happened. I wanted to go and see the Receiver in person.

Q. When was the date?

A. I went to him with a letter of introduction the 23rd of November.

Q. What did you say?

A. I stated my case. He said he could not see it my way. He had to act for the general good of a great body of creditors. I stated most fully——

Q. Did he ever tell you anything about the fact that A. O. Brown & Company claimed to have closed out or had closed out your open account?

A. I don't think he did, specifically.

By the MASTER:

Q. Was that fact talked of or discussed between you, as to what action, if any, A. O. Brown & Company had taken in the exchange on your open short contracts?

A. I don't believe it was.

Adjourned to February 11th, 1909, at 2 p. m.

54 Before Hon. John J. Townsend, Special Master.

Adjourned Hearing.

NEW YORK, *February* 11*th* 1909—at 2 p. m.

Present:

Mr. Carter, for the Petitioner;
Mr. Wolf, for the Trustee.

Mr. CARTER: The petition of James E. Gorman reclaiming two hundred and fifty shares of Greene Cananea Copper Company's stock should be amended so as to make it apply to the Trustee of the bankrupt, as successor to the Receiver.

THOMAS B. BATES, recalled.

Direct examination continued by Mr. CARTER:

Q. Have you been able to find, or have you in your possession, the telegrams which were asked for at the last hearing?
A. I have not.
Q. Have you been able to find, or have you in your possession, the stock ledger and blotter which were kept in the Chicago offices?
A. No, sir, I have not.
Q. Nor the blotter ledger, if there is such a book?
A. I have not found it.

By the MASTER:

Q. Have you found any Chicago books?
A. No, sir, not any.

Mr. CARTER: I should like to offer in evidence the account of James E. Gorman, appearing in ledger number 9.
Same admitted and marked Gorman's Exhibit number "3."
Mr. CARTER: I should like to have the account copied into the record physically.

55 Q. Can you tell me what book of A. O. Brown & Company would show the number of a certificate which was purchased on a given order to buy?
A. Purchased in New York?
Q. Yes?
A. Yes, it would show in the stock blotter.
Q. Have you the stock blotter here with you?
A. No, sir.
Q. Can you produce that at the next hearing?
A. I can, yes, sir.
Q. Do you know from your examination of the books whether there are any other claims for one hundred shares of Chicago Subway stock certificate 3732?

Mr. WOLF: I object to that as incompetent, irrelevant and immaterial.

Q. Did you ever hear of any claim for this certificate?
A. I cannot say positively. We have had quite a number
claims. I have turned them over to Mr. Littlefield or to Mr. Wol
Q. Would your answer be the same as regards the Greene Canan
Copper stock?
A. (No answer.)

By the MASTER:

Q. How can you find out whether or not there is any other clai
A. I cannot tell that.

Mr. WOLF: Either Mr. Littlefield or myself are competent wi
nesses as to that.
Mr. CARTER: Do you know what securities are on hand, so f
as it relates to this proceeding?
Mr. WOLF: Yes, sir.
Mr. CARTER: I withdraw the question I asked Mr. Bates

56 Q. Can you tell me the full name of Mr. Rhoades?
A. Jackson Waldo Rhoades.

Subscribed and sworn to before me this — day of ——, 1909.
—— ——.

W. RHEA WHITMAN, being called as a witness on behalf of t
petitioner, and being first duly sworn by the Master, testified
follows:

Direct examination by Mr. CARTER:

Q. Mr. Whitman, did you have charge of the orders which we
received from the Chicago office in April and August, 1908.

PHILLIP E. SAMUELS: I object to Mr. Whitman being examine
and being asked to answer that question in particular, on the grou
it may incriminate him.
The MASTER: I overrule the objection made by Counsel. I sh
not entertain objections until the question is propounded to t
witness, and the witness raises an objection to a particular questi
which has been propounded.
Mr. SAMUELS: I ask that I may advise the witness that he ne
not answer any certain questions.
The MASTER: I will advise him as to that. Mr. Whitman, you a
not bound to answer any question that may incriminate you.

A. I did not.
Q. Do you know the general practice of your firm as to the pu
chase in April and August of 1908——

Mr. WOLF: I do not see the materiality of all this.
The MASTER: Let me hear the question.

(Mr. CARTER continuing:)

57 Q. Of the stock of the Greene Cananea Copper Compan
and Chicago Subway Stock, as to whether you wou
purchase that stock, or either of them on margin?

Mr. WOLF: I object to that as irrelevant, incompetent and immaterial.
The MASTER: Objection sustained.

Q. Was it the custom of your firm, upon the purchasing of stock for clients, whether that stock was purchased on margin, or whether it was purchased outright, to place all of the certificates received in one lot, and to make your deliveries indiscriminately from that lot on future transactions?

Mr. SAMUELS: I object to that.
The MASTER: Objection overruled.

A. That is a matter of the cashier's—I don't know just how he handles those securities.
Q. He would have charge of this?
A. Yes, sir.
Q. Mr. Whitman, did your firm assign on August 25th, 1908, in favor of Mr. Jackson W. Rhoades?
A. They did.
Q. Were all open accounts on your books at that time closed out under the rule—the open running accounts?

Mr. WOLF: I object to that as immaterial.
The MASTER: Objection overruled.

A. I cannot answer that; I do not know.
Q. Would the assignee know that?
The MASTER: He never qualified.

Q. How long have you been in business as a broker, in Wall Street?
A. As a broker?
58 Q. Or as a banker and broker?
A. About two years, with the firm of A. O. Brown & Company.
Q. Had you been in that business prior to that time?
A. In the employ of brokers.
Q. For how many years?
A. Six years, I should say.
Q. Do you know the rule of the Stock Exchange in regard to the closing out of accounts under the rule, in case of an assignment of members of a Stock Exchange firm?
A. I do not.
Q. Never heard of it?
A. I know there is is such a rule; I do not know what the rule is.
Q. Did you receive notice that all your accounts were closed out?

Mr. WOLF: I object to that as irrelevant and immaterial.
The MASTER: Objection overruled.
Mr. WOLF: I take an exception.

A. I didn't receive any notice myself. I don't know just what they did in that matter.

Q. What member of your firm, if any, would receive such a notice?

A. I do not know that any member would.

Q. Who would receive notices coming from other members of the Stock Exchange, sent to your office?

A. The cashier.

By the MASTER:

Q. Was you in charge of the office at 30 Broad Street?

A. I was in charge of the working force.

59 Q. At 30 Broad Street?

A. Yes, sir.

By Mr. CARTER:

Q. Were all the books of your firm turned over to the assignee at the time of the assignment?

A. I do not know what was turned over to him. I do not think I was around there at the time.

Q. Who had charge of the office at that time?

A. That was after the failure—nobody in charge particularly, at that time.

Q. I mean at the time of the failure—at the time of the assignment, at the time the assignment was made, who had charge?

A. Who had charge of our office?

Q. Yes, the physical properties of the office?

A. I don't quite catch your meaning.

Q. Who was in charge of the 30 Broad Street office at the time you failed?

A. Mr. O'Connor was the general manager.

Q. What is his full name?

A. Cornelius O'Connor.

Mr. CARTER: That is all.

Mr. WOLF: I have no cross-examination.

Subscribed and sworn to before me this — day of ——, 1909.

——— ———.

RALPH WOLF, being called as a witness on behalf of the petitioner, and being first duly sworn by the Master, testified as follows:

Direct examination by Mr. CARTER:

Q. Can you state whether there are any other specific claims

60 for the specific one hundred shares of Chicago Subway, represented by certificate number 3732, beside that of James E. Gorman?

A. I personally do not know of any up to date. Whether or not one will hereafter be made is a question I should not like to foreclose.

Q. From what you know of the books of A. O. Brown & Company, do you know of any basis upon which any just claim could be made to said certificate?

A. I think I would rather have the Master pass on that question.

The MASTER: I cannot.

Q. Do you know of any other account of A. O. Brown & Company in which at the time of the assignment, or at the present time, there is an open account, calling for the delivery to the client of one hundred shares of Chicago Subway?

A. I cannot answer, because I have never looked at the books.

Q. Do you know of any claims against A. O. Brown & Company for two hundred and fifty shares of Greene Cananea Copper Stock beside that of James E. Gorman?

A. I must make the same answer to that. I can state the facts in connection with that stock, and then the Master can answer as to whether a proper claim can be made by some one else.

By the MASTER:

Q. Are you in charge of these claims when they are presented?

A. Yes, sir.

Q. On behalf of the Trustee, or his Counsel?

A. Yes, sir.

Q. You know of no claim brought to your attention up to date?

A. No, sir. The books of A. O. Brown & Company show
61 that on April 14th, 1908, they bought for the account of James E. Gorman one hundred shares of Greene Cananea Copper Stock, from Clark, Dodge & Company, and received certificate A-335. This certificate was delivered to J. T. —— on May 6th, 1908, on account of a sale from H. Wright & Company, of Cleveland, Ohio. On April 14th, 1908, A. O. Brown & Company bought for James E. Gorman fifty shares of Greene Cananea Copper Stock from C. H. Schott & Company, and received certificate Y-11083. This certificate was after, on May 14th, 1908, delivered to Messrs. DeCoppet & Doremus, on account of balance of trade on that date. April 14th, 1908, A. O. Brown & Company bought for James E. Gorman fifty shares of Greene Cananea from C. H. Schott & Company, and received certificate B-6589. This certificate was thereafter delivered to DeCoppet & Doremus, on April 16th, 1908, on account of a sale of L. E. Gorton, of Detroit, Michigan. On April 14th, 1908, A. O. Brown & Company bought for James E. Gorman fifty shares of Greene Cananea Copper Stock from Wrenn Brothers, and received certificate B-6537. This certificate was delivered to Carpenter & Baggott on May 14th, 1908, on account of a sale to Parson, Snyder & Company, of Cleveland, Ohio.

It is stipulated that Charles E. Littlefield, Trustee for A. O. Brown & Co., has three hundred and fifty shares of Greene Cananea Copper Stock endorsed in blank, made up of different certificates, and according to the books A. O. Brown & Company at the date of the assignment ought to have had on hand, if there were no other claims between them, two hundred and fifty shares of Greene Cananea Copper Stock for James E. Gorman.

Mr. CARTER: It is conceded that the Receiver has one hundred shares on certificate number 3732, of Chicago Subway Stock.

Mr. WOLF: That is conceded.

Adjourned to February 23rd, at 3 p. m.

62 Before Hon. John J. Townsend, Special Master.

Adjourned Hearing.

NEW YORK, *April 14th*, 1909—at 11 a. m.

Present:

Mr. Carter, for the claimant.

Messrs. Hays, Hirschfield & Wolf, by Mr. Ansorge, for the Trustee.

JOHN B. NEVEL, being called as a witness on behalf of the claimant, and it being stipulated by the parties hereto that the witness may be sworn before a Notary Public with the same force and effect as though sworn before the Referee, Mr. Martin C. Ansorge administered the oath, and the witness testified as follows:

Direct examination by Mr. CARTER:

Q. Mr. Nevel, were you connected with the firm of A. O. Brown & Company before the assignment?

A. I was.

Q. In what capacity?

A. As margin clerk.

Q. I show you a book, and I ask you if you know what it is (indicating book)?

A. The margin slate.

Q. Of A. O. Brown & Company?

A. A. O. Brown & Company.

Q. Kept in the New York office?

A. Yes, sir, in the New York office.

Q. Can you see in that book any reference to the account of James E. Gorman, E. X. number 7?

A. E. X. number 7, yes, sir.

Q. What does it show?

63 A. Shows him long one hundred subway, two hundred and fifty Greene Cananea, paid for,—short one hundred Atchison, and one hundred Southern Pacific, credit balance $19,829.65.

Q. What do you mean by the expression "Paid for" in speaking of the one hundred Subway, and the two hundred and fifty Greene Cananea?

A. The stocks were not carried on margin, or figured as collateral, for stocks carried on margin

Q. They were figured as paid for, as the property of the client?

A. They were.

By Mr. ANSORGE:

Q. Does that last statement appear in the book?

A. Yes, sir.

Q. What I want to know is how it appears from this book that these stocks were held as the property of Mr. Gorman?

A. As far as the margin clerk goes, they were figuring Atchison at $9,000, and Southern Pacific at $100, is $19,000, with a credit balance,—to bring in those stocks would cost $19,000, his ledger balance showed he had a credit with us of $19,829.65.

Q. In cash, or equity in the account?

A. Had he covered these stocks we would have had to pay him $830, and delivered these stocks.

By Mr. CARTER:

Q. When you state that $19,829 represents credit in cash, does that include the one hundred of Atchison and the Southern Pacific?

A. That is the ledger balance. It may not be cash. That includes the sale of these two stocks, and the purchase of these.

Q. It includes the sale of one hundred Atchison and Southern Pacific?

64 A. It does, yes, sir.

Q. How does it appear on that book that the one hundred Subway and the one hundred and fifty Greene Cananea were paid for absolutely, and not carried on margin?

A. Well, it shows conclusively to me. Our rule was where there is no price opposite that those stocks were paid for. In other words we deducted for this Subway the cost twenty-four hundred, we deducted from the equity $2,400.

Q. Your rule was that if there was no price opposite the stock that would mean that they were paid for?

A. Yes, sir.

Q. Would these checks which appear opposite the one hundred Subway and the one hundred and fifty Greene Cananea indicate that? Are those put there in place of any price?

A. No, sir,—they indicate——

Q. They indicate that they were not carried at any price?

A. Not carried at any price; they were paid for.

Mr. CARTER: I offer this statement herein in evidence, being the last five lines on page ten of the New York Margin slate, beginning "number 7 Stox," and ending on the fifth line "two hundred and fifty G-C-C."

Mr. ANSORGE: I object to the admission of that in evidence unless it is shown that the figures refer to the stock which is now claimed by the petitioner.

The MASTER: Objection overruled.

Mr. ANSORGE: Exception.

Same was admitted and marked Exhibit "4" of April 14th, 1909.

Q. Does this record show, Mr. Nevel, that it was the record of ledger account E. X. 7?

65 A. It does, yes, sir.

Mr. CARTER: It appears from the former testimony that the account contained ledger number 9 and denominated E. X. number

7, was the account of James E. Gorman with A. O. Brown & Company.

At this point the Referee also swore the Witness Nevel, as to the testimony already given and that to be given.

Mr. CARTER: I ask that the Exhibit "4" of today be copied physically into the record.

7 Stox	100	Subway	100	Atch	90	1982965	830
			100	So Pac.	100		
	250	G. C. C.					

Subscribed and sworn to before me this — day of ——, 1909.

——— ———.

HARRISON F. MARTIN, being duly called as a witness on behalf of the claimant, and being first duly sworn by the Master, testified as follows:

Direct examination by Mr. CARTER:

Q. Mr. Martin, will you state whether you have any connection with the New York Stock Exchange?

A. I am second assistant secretary.

Q. Have you occupied that office since the beginning of February, 1907, or prior to that date?

A. Yes, sir; that is right.

Q. Have you with you a copy of the constitution of the New York Stock Exchange?

A. I have.

Q. Does that contain a statement of the rules of the Stock Exchange as to closing out accounts upon the assignment of any member of the Exchange?

66 A. It does.

Q. Will you please produce that rule?

A. (Witness produces a book and refers to Article number 28, Section 1, page 55.)

Q. Was this rule in precisely the same form, as it is today, the beginning of January, 1907?

A. It has not been altered.

Mr. CARTER: I offer it in evidencce, and ask that it be copied physically into the record.

"SEC. 1. When the insolvency of a member or firm is announced to the Exchange, members having contracts subject to the rules of the Exchange with the member or firm, shall without unnecessary delay proceed to close the same. If the contracts involve securities admitted to quotation upon the Exchange the closing must be in the Exchange, either officially by the Chairman, or by personal purchase or sale. If the contracts involve securities not dealt in on the Exchange, the purchase or sale of such securities must be promptly made in the best available market. Should a contract not be closed, as above provided, the price of settlement shall be fixed by the price current at the time when such contract should have been closed under this rule."

Mr. ANSORGE: I object to it as immaterial and irrelevant.
The MASTER: Objection overruled.

Mr. ANSORGE: Exception.

Q. Will you state whether Atchison Common, and Southern Pacific Common, were listed on the Stock Exchange on August 24th and August 25th, 1908?

Mr. ANSORGE: I object to that on the ground the petition is for Greene Cananea, and Subway.

67 The MASTER: I overrule the objection.
Mr. ANSORGE: Exception.

A. They were admitted to dealings on the Exchange.

Mr. ANSORGE: I shall wish to reserve the right to cross-examine all the witnesses called to-day in this Gorman petition.
The MASTER: Your rights will be reserved.

Subscribed and sworn to before me this — day of ——, 1909.

—— ——.

THOMAS B. BATES, recalled to the stand.

Direct examination continued by Mr. CARTER:

Q. Is there any one of the Brown, the A. O. Brown & Company books which would show whether the stock borrowed by A. O. Brown & Company for short sales had been closed out?
A. Yes, sir.
Q. What is that book?
A. Ledger number three. We used to call it general ledger number three.
Q. Does that book show where the stock were borrowed in order to make short sales?
A. Where?
Q. When?
A. It shows when they were borrowed.
Q. Does it show that any Atchison or Southern Pacific was borrowed on or about July 20th, 1908?
A. One hundred Southern Pacific was borrowed July 21st, according to the records of this book.
The MASTER: What is the folio number of the book?
The WITNESS: It is all by date. And one hundred Atchison on July 20th.

68 Q. Does that book show, Mr. Bates, whether or not all the Atchison and Southern Pacific Common borrowed by A. O. Brown & Company was closed out by the people from whom it was borrowed at the time of the assignment, or prior thereto, August 25th?

A. Shows that all contracts were wound up, on this book. No borrowed stocks open on the day of the assignment, August 25th. They had either been returned by A. O. Brown & Company, or bought in under the rules by the lenders.

—— ——.

Subscribed and sworn to before me this — day of ——, 1909.

——— ———.

JACKSON WALDO RHOADES, being called as a witness on behalf of the claimant, being first fully sworn by the Master, testified as follows:

Direct examination by Mr. CARTER:

Q. Mr. Rhoades. will you state what if any connection you had with A. O. Brown & Company, and between what dates?

A. I cannot give the dates, exactly. I was cashier for over a year.

Q. Running down to the time of the failure?

A. Running down to the time of the failure.

Q. That is until August 25th, 1908?

A. Until August 25th, 1908.

Q. As cashier did you have personal charge of all securities which came in and went out of the office, on deliveries, and the receipt of securities?

A. No, sir, I had nothing to do with the deliveries, or the receipt of any securities in the office.

Q. Did you have charge of what is known as "The tin box"?

69 A. Only while it was in the office.

Q. When stocks were purchased for one of your clients, whether they were paid for in full, or purchased on margin, were the securities actually acquired on those orders placed in the same box?

A. They were placed in the same box.

By the MASTER:

Q. How were they identified with respect to the name of the purchaser?

A. They were not identified. I had no way of knowing whether a man bought them outright, or on margin.

Q. Suppose X. Y. Z. gave you an order to buy outright, and there was a delivery made on that of the certificate. When that certificate was received by you what was done to show that it was X. Y. Z.'s property?

A. Absolutely nothing.

Q. No memorandum made on the certificate, or envelope, or anything?

A. The only memorandum made was this margin book, Exhibit "4."

Q. Suppose that X. Y. Z. gave you an order to buy outright, where he was dealing on margin, and there was a delivery made on that order, and the certificate of stock instead of being pledged in a loan, it happened by some extraordinary situation to get into this tin box. Was it identified as X. Y. Z.'s in any way?

A. No, sir.

Q. Simply went into the box?

A. Simply went into the box.

Q. Apparently the outright property of A. O. Brown & Company?
A. Yes, sir.

70 By Mr. CARTER:

Q. If any sales were made by A. O. Brown & Company of securities that might be in that box, was it customary for A. O. Brown & Company to take the certificates for the proper number of shares from that box, to make deliveries?
A. Yes, sir.
Q. Indiscriminately?
A. Providing there was no stock in that box in our customer's name. I mean stock previously transferred to a customer's name. That was the only thing that showed, when issued.
Q. If there had been a transfer?
A. Yes, sir.
Q. If that stock had been transferred into a customer's name it would have been impossible to make good delivery without the assignment of the customer?
A. It would.
Q So that the stocks assigned over to A. O. Brown & Company, or in blank, were used indiscriminately for making deliveries?
A. He had to sign it.

By the MASTER:

Q. Suppose stocks stood in the name of X. Y. Z., and a power of attorney, and endorsement on the back were signed, what did you do with that certificate?
A. That was carried and held in his name. While it may be pledged in the name—it was pledged, and a certain mark put on it; in taking out similar shares they would not get mixed up.
Q. He would not endorse it in blank unless he intended you to use it as a margin?
A. He would not.
71 Q. So I don't suppose you had many certificates in the name of X. Y. Z. when he left them for the purpose of safekeeping?
A. No.

By Mr. CARTER:

Q. If a customer bought outright, and didn't have the stock transferred to his name, they would be used indiscriminately in making deliveries?
A. They would.

By the MASTER:

Q. No matter whether they had been delivered to A. O. Brown & Company in pursuance of an order to buy, which might be given by the customer?
A. No.

By Mr. CARTER:

Q. Were you designated as assignee by A. O. Brown & Compa at the time of the failure?

A. Yes, sir.

Q. When so designated did you send any notices whatsoever the Chicago office?

A. I think not; I may have answered some telegrams, but notices.

Q. If the Chicago office had inquired in the New York office as whether the New York office had been closed out under the ru would you have answered?

A. I think I did answer; I said that they had been. That mea contracts outstanding. We had nothing to do with the custom at all.

Q. It would have to do with all contracts between you and oth brokers, for stocks borrowed?

A. If we were long they had to be sold, and if we were short th had to be covered at once.

Adjourned to April 22nd, 1909.

72 Before Hon. John J. Townsend, Special Master.

Adjourned Hearing.

NEW YORK, *April 29th*, 1909—at 11 a. m.

Present:

Mr. Carter, for the Claimant.
Mr. Kaufman, for the Trustee.

It is conceded by the Trustee that the average price for Southe Pacific Common on August 25th, 1908, was $100 per share, a that the average price of Atchison Common was $88 per share.

It is also conceded that whenever Chicago Subway certificate stock number 3732 is mentioned in the proceeding, it should corrected to certificate number 5732.

It is also conceded that A. O. Brown & Company in executing t order of the petitioner for one hundred shares of Chicago Subw Stock actually received on August 24th, 1908, certificate numb 5732.

It is also conceded that J. B. Neville, the New York Margin Cle kept the margin slate of A. O. Brown & Company at the time of t assignment, and that Exhibit number "4" is the margin slate as that date, August 25th, 1908.

The Trustee waives the signature of the witnesses.

Mr. CARTER: I offer the depositions which were taken in Chica of Charles T. Atchison, Oliver A. Olmstead, Clarence Lasier a Albert M. Barrel, and I also offer the Chicago Margin slate.

Considered as marked in evidence.

Mr. CARTER: The petitioner rests.

Mr. KAUFMAN: The Trustee rests.
Briefs are to be submitted in three weeks from date.
Case closed.

73 *Proceeding to Reclaim Property of James E. Gorman.*

Appearances:

James L. Coleman, Esq., on behalf of Petitioner.
F. D. Silber, Esq., on behalf of the bankrupts.

Stipulation.

It is hereby stipulated and agreed by and between counsel for the respective parties hereto that the testimony of Albert M. Barrell may be taken on behalf of the petitioner herein, pursuant to the annexed and foregoing notice to be used with the same force and effect as if the said witness Albert M. Barrell had been named in said notice.

——— ———,
Counsel for Petitioner.

——— ———,
Counsel for Bankrupts.

74 United States District Court, Southern District of New York.

In Bankruptcy.

In the Matter of ALBERT O. BROWN, G. LEE STOUT, EDWARD F. Buchanan, Lewis G. Young, Samuel C. Brown, and W. Rhea Whitman, Co-partners, Trading under the name of A. O. Brown & Company, Bankrupts.

Proceeding to Reclaim Property of James E. Gorman.

STATE OF ILLINOIS,
County of Cook, ss:

SIR: Please take notice that on the 22nd day of January, 1909, at 2.30 o'clock, p. m., at my office, Room 1011, in the Railway Exchange Building, at No. 9 Jackson Boulevard, City of Chicago, State of Illinois, I will, as provided in Sections 863, 864 and 865 of the United States Revised Statutes, take the depositions of Oliver A. Olmstead, Charles T. Atkinson and Clarence Lasier, all citizens of the State of Illinois, and residents of the City of Chicago, and residing in the Northern District of Illinois, Eastern Division, and outside of the Southern District of New York, and more than one hundred
75 (to wit, 980) miles distant from New York City in said district, the place at which the trial of said proceeding is pending, as witnesses for the petitioner, James E. Gorman; and you will further

Please take notice that at the time and place of taking the depositions as aforesaid, you are entitled to be present, and to put interrogatories to the witnesses aforesaid.

Dated, Chicago, Illinois, January 11th, 1909.

[L. S.] F. B. DICKINSON,
Notary Public, Cook County, State of Illinois.

To Charles E. Littlefield, Esq., Trustee of the Bankrupts; or to Hays, Hershfield & Wolf, Esqs., Attorneys for said Trustee.

(Endorsed:) Notice of taking depositions. Filed Jan'y, 1909.

UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division:

STATE OF ILLINOIS,
County of Cook, ss:

The examination of witnesses de bene esse, beginning on the 22nd day of January, A. D. 1909, at 2.30 o'clock p. m., on behalf of the petitioner, before me F. B. Dickinson, a Notary Public in and for said County of Cook, State of Illinois, in the Northern District of Illinois, Eastern Division, at my office at Room 1011 Rail-
76 way Exchange Building, No. 9 Jackson Boulevard, City of Chicago, County of Cook, State of Illinois, in the Northern District of Illinois, Eastern Divsion, in a certain suit now pending in the District Court of the United States for the Southern District of New York, in the district aforesaid, in the matter of Albert O. Brown, G. Lee Stout, Edward F. Buchanan, Lewis O. Young, Samuel C. Brown and W. Rhea Whitman, co-partners trading under the name of A. O. Brown & Company, bankrupts, in re petitions of James E. Gorman.

CHARLES T. ATKINSON, a witness produced on behalf of the said petitioner, being first duly sworn, deposes and says as follows:

Direct examination by Mr. COLEMAN:

Q. 1. Please state your name, age, occupation, and residence.

A. Charles T. Atkinson; 44 years of age. My present occupation is that of manager for Farson & Son Company in the Railway Exchange Office, No. 171 Michigan Avenue; and my residence is 2022 Indiana Avenue, Chicago.

Q. 2. Illinois?

A. Illinois.

Q. 3. What position did you hold just prior to your present one?

A. The last position that I held before I went with Mr. Farson, was that of a room broker with A. O. Brown & Company.

Q. 4. How long did you hold that position?

A. From the time that they opened their office in Chicago (January 1st, 1907) up to the time that they closed their office here, August 25, 1908.

Q 5. You were so employed then on or about the 13th of April, 1908?

A. Yes, sir.

77 Q. 6. Now state briefly what your duties were in such position, your general duties.

A. My general duties were to look after the accounts of clients of A. O. Brown & Company that were handled by that office, in the way of keeping them informed over the telephone, or as they came into the office, about the market movements of stocks, and whether their orders had been properly attended to, putting their orders in as they should be given to me, and to report to them the execution of such orders when they were reported to us from New York, and to do whatever I could and all I could, of course, to build up the business of A. O. Brown & Company, in the way of soliciting business for them among the people whom I knew were interested in stocks, at different times.

Q. 7. Your business included then, the buying and selling of stocks on orders?

A. Yes, sir.

Q. 8. Now, what do you know with reference to any negotiations which James E. Gorman had with you as an agent for A. O. Brown & Company, on or about April 14, 1908, with reference to the purchase of Green Cananea stock?

A. Do you want me to state what happened?

Q. 9. Yes, fully, beginning at the very beginning.

A. Mr. James E. Gorman had an account with A. O. Brown & Company, which was handled in our office, the Railway Exchange Building office, and it was one of my duties to look after Mr. Gorman's orders, both as to the execution of them and to report to him any changes in the market affecting any investments that he might have.

On or about April 14, in connection with this purchase of the Green Cananea stock, Mr. Gorman came into the office and

78 said that he would like to buy some of the Green Cananea, and asked me if we could buy it for him. I told him that we could; that we had the quotations posted on our board; that we executed orders for Green Cananea in New York and that that was a stock in reference to which I was doubtful whether our people would carry it for him on a margin; that as to that, I would have to find out.

I then wired direct from our office to the New York office and inquired as to whether or not they would carry Green Cananea on a margin. Within the course of an hour or so—I should say less than an hour—I received a message back that they would not carry that stock on a margin; it would have to be paid for in full.

I reported this to Mr. Gorman, and he gave me instructions to buy 250 shares of it. This order was executed and the execution of it was reported to Mr. Gorman. I do not remember just whether at the time it was reported to him, but within a short time after that, within a day after that, or the next time I saw Mr. Gorman, I said to him, "Shall we have that stock transferred to your name?" "The

stock is paid for, and we can have that stock transferred to you name, and delivered to you."

Mr. Gorman replied, "No," that that was not necessary, that h would possibly want to sell it at some time, and carrying it in Ne York all paid for, that they would be able to deliver the stock ther promptly on any sale that he might make of that stock. For tha reason no action was taken through our office about instructing th New York office to transfer the stock.

Q. 10. When you say that Mr. Gorman did not wish it carried i his own name, do you mean that he did not wish it registered o the books of the Green Cananea Company?

79 A. Yes, sir.

Q. 11. That is what you meant by that expression?

A. Yes, sir.

Q. 12. Transferred to his own name?

A. Yes, sir, transferred to his own name, on the books of th Green Cananea Company; he did not wish that done.

Q. 13. Now, on the day when Mr. Gorman gave you the order t buy this stock, did you ascertain that his balance, his credit balanc with A. O. Brown & Company, was sufficient or more than sufficien to take care of the purchase of the 250 shares of the Green Canane stock at the market price at which it was bought?

A. No, I did not ascertain that, but I knew it before.

Q. 14. Well, explain that?

A. A broker always has, if not in actual figures before him, i some book of record, he has in his mind a general knowledge o about what a customer's credit balance is; and also a general know edge of what stocks the customer is carrying in his account. knew at that time that Mr. Gorman's credit balance was more tha enough to take care of that purchase, so that I did not ascertain a that particular day just what his credit balance was.

Q. 15. You are positive are you, that it was more than sufficien to take care of that purchase?

A. Yes, sir.

Q. 16. You mentioned sending a message to A. O. Brown & Com pany in New York, and receiving a message back with reference t whether A. O. Brown & Company would carry this stock on margi Tell me what has become of that message. Have you got it?

A. It would be handled with all of the other message

80 sent and received from our office, filed with the message of the day, and sent (as was the custom at that time) afte an accumulation of messages had been made at our office,—w would send them to the main office in the Commercial Bank Buil ing, and it is my understanding, that all of those records includin those messages——

Mr. SILBER: I do not think he had better testify as to his unde standing.

Mr. COLEMAN:

Q. 17. Unless you know it to be a fact.

A. I do not know it to be a fact, that is as to what has becom

of the messages, beyond the fact that they were sent from our office in the regular course and conduct of business.

Q. 18. Did anyone from that office in the main building—the Arcade, was it?

A. Commercial Bank Building.

Q. 19. Did anyone from that office in the Commercial Bank Building tell you what had become of the message?

A. No.

Q. 20. Nobody did?

A. No.

Q. 21. Now, you told Mr. Gorman, did you, that A. O. Brown & Company had purchased this stock for him?

A. Yes, sir.

Q. 21½. That was the advice received by you from the New York office?

A. Yes, sir.

Q. 22. Have you seen any of the statements of account sent out by A. O. Brown & Company? Were they received by your office?

81 A. They were sent under seal addressed to Mr. Gorman, in this instances, in care of the Railway Exchange office. I never saw any of those statements.

Q. 23. Did you deliver them to Mr. Gorman?

A. Yes sir; they were delivered from time to time as Mr. Gorman came into the office.

Q. 24. Now, did you have any subsequent transaction or negotiation with James E. Gorman, on or about August 24th, with reference to 100 shares of Subway stock?

A. No.

Q. 25. You did not?

A. No, sir.

Q. 26. Have you been told anything with reference to that by anyone connected with the Chicago office of A. O. Brown & Company?

A. Yes, sir, I have.

Q. 27. Will you please state what that was?

Mr. SILBER: We object to any testimony as to what the witness was told by someone connected with the Chicago office of A. O. Brown & Company, as being purely hearsay, and not admissible.

Mr. COLEMAN:

Q. 28. Who told you anything that was told to you?

A. Well, I cannot tell definitely who told me anything more than that I had access to the records.

Mr. SILBER: Don't state what was said yet.

Mr. COLEMAN: Please let him finish his answer.

A. (continued). I had access to the record of all the transactions of the Railway Exchange Building office that were kept in the office of A. O. Brown in the Commercial Bank Building. As soon as I

82 got home from my vacataion on the 25th of August, and learned of this failure it was one of my first efforts to ascertain the standing of all of the accounts that I had been

handling in connection with A. O. Brown & Company's business
the Railway Exchange office. In that way I acquired informatio
as to Mr. Gorman's account, but I cannot say whether anyone to
me anything about it. All I can say is that the information w
open to me and I became informed in that way.

Q. 29. Now, these accounts which you speak of are preserve
are they, in the books of A. O. Brown & Company in the New Yo
office?

A. I could not tell as to that. Do you mean preserved at the pre
ent time?

Q. 30. Yes?

A. I do not know what they have done with the books dow
there.

Q. 31. Were they accounts which originated in the New Yo
office, and were made up from the books of the New York offic
if you know?

A. When you say "originated," the account originated here wit
the order to buy or the order to sell, and all of the books dealin
with the intimate details of the account were kept in New York.

Q. 32. Now, when a statement would be made out of an accoun
that would be made out from the New York office, would it not?

A. Yes, sir.

Q. 33. So that those account books reflecting your knowledg
which you ascertained or derived by examining the records in th
Commercial National Bank Building, should be down in New Yo
in the hands of the Receiver at the present time?

A. They should be there, and to the best of my knowledge an
belief, they are there.

Q. 34. Do you know the technical or trade name for M
83 Gorman's account with A. O. Brown & Company?

A. Yes, sir.

Q. 35. What was that, please?

A. "Ex. #7."

Q. 36. That was the account under which, or in which all h
dealings were recorded?

A. Yes, sir.

Cross-examination by Mr. SILBER:

X Q. 1. As I understand it, the one thing you did in referen
to the actual purchase of stock upon this particular account, was
send the order to New York to have that particular order executed

A. Only, as it is surrounded by the circumstances that I ha
described there, yes, sir.

X Q. 2. But what you did, in effect, was simply to send a pr
vate wire to your New York office to buy so many shares of th
stock?

A. Yes, sir.

X Q. 3. For the account of "Ex. #7"?

A. Ex. #7.

X Q. 4. And you received confirmation from New York to th
effect that that order was attended to?

A. Yes, sir.

X Q. 5. After that you never saw or heard anything more from the New York office with reference to that particular transaction. Did you?

A. No, sir.

X Q. 6. The knowledge that you have as to what was done with that order, is derived entirely from what you heard from New York?

A. That knowledge is based on these direct telegrams on the day of the execution of the order, and upon the fact that of
84 which I also had knowledge—that is, I had access to our records that we carried that stock long for Mr. Gorman on our records here.

X Q. 7. No cash or money passed in this particular transaction, did it?

A. Only as it would be charged into this account.

X Q. 8. But I mean, no new consideration passed for this particular transaction?

Mr. COLEMAN: The question is objected to inasmuch as you are calling for a conclusion of the witness.

Mr. SILBER: Well, he has testified to a good many conclusions, and I think on cross-examination, I am entitled to get anything I can.

(X Q. 8 was then read by the reporter.)

A. Just what does that mean?

X Q. 9. No money or anything else new, except in the way of the credit balance on the old account, passed at the time of the purchase of this stock?

A. No, sir.

X Q. 10. The books which showed any credit or debit upon this particular transaction were kept in New York?

A. Yes, sir.

X Q. 11. The books that you kept here were simply books referring to the orders that emanated from your office here?

A. Yes, sir, but even more than that; as to personal knowledge, I would not be able to say just the character of the record kept here of the actual cash balances or debit balances or credit balances.

X Q. 12. You could not tell by looking at the books which you kept here, what the condition of Mr. Gorman's account was, could you?

A. Yes, sir.

X Q. 13. In detail?

85 A. In detail up to the point where the interest was figured in, the current interest.

X Q. 14. The keeping of books in your branch office was only to enable you to check up the transactions that emanated from your office?

A. Yes, sir, and we kept in our office in the Commercial Bank Building, a record of balances as they were last reported from New York; but there might be a period of two or three weeks from the

last or preceding month when interest was charged in the account where we would not have the latest details of all charges.

X Q. 15. Statements of these accounts were made out uniformly from the New York office?

A. Yes, sir.

X Q. 16. The Chicago office had nothing to do with that end of the business, had it?

A. Yes.

X Q. 17. Excepting to deliver the statement?

A. That is all.

X Q. 18. And those statements were sent by mail, as you have said, from New York?

A. Yes, sir.

X Q. 19. Who had charge of the books in your branch office here in the Railway Exchange Building?

A. The managers of that office were Mr. Oliver A Olmsted and Mr. David A. Noyes. All of the records and everything in that office was under their direct supervision, and we had a Mr. Lasier, who was in charge of our books there.

X Q. 20. He made the actual entries?

A. Yes, sir; that is my understanding.

X Q. 21. The purchase of this Green Cananea stock was supposed to be what you call a cash transaction, was it not?

A. Yes, sir.

86 X Q. 22. And as to the Subway stock, you have no personal knowledge?

A. I have no personal knowledge of that, except as I have described.

Mr. SILBER: That is all.

Redirect examination by Mr. COLEMAN:

R. D. Q. 1. Now, you keep in your office, do you not, what you call margin sheets?

A. Those were kept at the Commercial Bank Building office.

R. D. Q. 2. Now, if any transactions took place in New York, materially affecting the credit balance of a client, would not the New York office transmit that to you?

A. Very promptly.

R. D. Q. 3. The object was, was it not, to keep you informed as to the exact status of the accounts of the various clients?

A. Yes, sir.

R. D. Q. 4. Now that account, Mr. Atkinson, could be drawn upon by the client, could it not?

A. At any time.

R. D. Q. 5. He could draw a check for it?

A. Yes.

R. D. Q. 6. And the money would be turned over to him?

A. Yes.

R. D. Q. 7. When the stock in question was purchased, was not a deduction made from that credit balance of this client to an extent equivalent to the amount paid for the stock?

A. I cannot tell myself what was done in this particular case, but my understanding is that it was done.

87 Mr. SILBER: I move to strike out the last answer of the witness, beginning with the words "my understanding is."

Mr. COLEMAN:

R. D. Q. 8. Were you not advised, Mr. Atkinson, by the New York office, that this stock had been purchased?

A. Yes.

R. D. Q. 9. Did they advise you that a debit against Mr. Gorman's account had been made?

A. No, sir.

R. D. Q. 10. They did not?

A. No.

R. D. Q. 11. Would not A. O. Brown & Company, in the usual course of business advise you of any deduction to make from the credit account of any client on account of a transaction?

A. They would not advise me, no.

R. D. Q. 12. Would they advise your house in Chicago?

A. Yes, sir.

R. D. Q. 13. Before you purchased the stock or gave the order to New York, did you or did you not know whether Mr. Gorman had a balance sufficient to pay for it?

A. I did know.

R. D. Q. 14. Was not that order made with reference to that credit balance?

A. It was made with full knowledge of his balance, yes, sir.

R. D. Q. 15. Was it not intended to be deducted from the balance?

Mr. SILBER: I object to that question as calling for a conclusion, and being purely hearsay.

A. Surely.

Mr. COLEMAN:

R. D. Q. 16. Would you have executed the order had Mr. Gorman not had that balance sufficient to take care of it?

A. We would have executed any order that Mr. Gorman
88 would have given to us under any circumstances; but in this case, it was executed with the knowledge that his balance was ample to take care of it.

R. D. Q. 17. Did you not testify that you had asked your New York house, whether you could buy this stock on a margin, and did you not say that they advised you that you could not?

A. Yes.

R. D. Q. 18. Now, when you said that you would execute any order that Mr. Gorman gave you, you meant either to deduct the amount from his account, or else conduct the transaction on his personal credit?

A. Yes, sir.

R. D. Q. 19. That is, would not mean the carrying of the stock on a margin?

A. No, it would not.

R. D. Q. 20. Was your house notified of the credit? Can you say the house was notified of this credit?

A. I know nothing about the bookkeeping arrangements of the house.

Recross-examination by Mr. SILBER:

R. X Q. 1. The question as to whether or not Mr. Gorman paid you any money at the time of this transaction, did not enter into the matter with you at all, did it, Mr. Atkinson? When you say that you knew that he had a sufficient credit balance to pay for the stock, it would not have made any difference to you whether he did or did not have that credit balance, at the time he gave the order?

A. No, sir.

R. X Q. 2. The order would have been executed in any event?

A. Yes, sir.

R. X Q. 3. If you had executed the order upon credit, you simply would have had a statement of the amount due sent to Mr. Gorman?

A. Yes, sir.

R. X Q. 4. And he would have taken care of it?

89 A. Yes, sir.

R. X Q. 5. When you say that you were advised that the stock had been purchased, you mean that you got some sort of a confirmation from New York?

A. Yes, sir.

R. X Q. 6. Have you the original paper in your possession now?

A. No, sir.

R. X Q. 7. Do you know what became of it?

A. Only as I described before.

R. X Q. 8. It was one of those sent back to New York?

A. It was one of those telegrams that we received with many others through the day. They were tied up with the day's business over the wire, in a bundle of messages, and, after an accumulation of those in our office, they were sent over to our main office in the Commercial Bank Building.

R. X Q. 9. The Railway Exchange office was a branch of the office in the Commercial Bank Building in Chicago?

A. The Railway Exchange office was a branch of the main office in the Commercial National Bank Building.

R. X Q. 10. Did you have any other branch offices in Chicago except those two?

A. No, sir.

R. X Q. 11. That applied to confirmations as well as to original telegrams, the question of sending them to New York?

A. Yes, sir.

And further deponent sayeth not.

Subscribed and sworn to before me this 25th day of January, A. D. 1909.

——— ———,
Notary Public.

90 OLIVER A. OLMSTEAD, a witness produced on behalf of the said petitioner, being first duly sworn, deposes and says as follows:

Direct examination by Mr. COLEMAN:

Q. 1. Please state your name, age, occupation and place of residence.

A. Oliver A. Olmsted; age 49, manager for Farson Son & Company, stock brokers, residence Virginia Hotel, Chicago.

Q. 2. What position, if any, did you hold in the employ of A. O. Brown & Company?

A. One of the managers of the Chicago office in the Commercial National Bank Building.

Q. 3. During what period were you so engaged?

A. Well, I was trying to think when we went into the Commercial National Bank Building. Well, it was durng the year 1907-1908.

Q. 4. You were in such position then from about April, 1907, until the firm went into bankruptcy?

A. Yes, sir.

Q. 5. On what day was that?

A. That the firm went into bankruptcy? Well, they failed on August 25, 1908.

Q. 6. What were your duties in general in that position?

A. Well, I was in charge of the stock and grain business in connection with Mr. Noyes. Mr. Noyes had more to do with the grain department and I was more specifically in charge of the stock business.

Q. 7. For A. O. Brown & Company?

A. For A. O. Brown & Company, yes, sir.

Q. 8. Do you know James E. Gorman?

A. I do.

Q. 9. What do you know about any transactions or negotiations which Mr. Gorman had with A. O. Brown & Company on
91 or about April 14th, 1908, with reference to an order for 250 shares of Green Cananea stock?

A. About that time Mr. Atkinson, who was employed at the Railway Exchange Building office called me on the telephone, and stated that he had an order from Mr. Gorman, to purchase 250 shares of Green Cananea and that A. O. Brown & Company of New York had refused to purchase unless the stock was paid for in full. At that time I went to the slates, as we call them, and looked up the account and saw that with the other securities, whatever they were, that there was money enough to pay for the Green Cananea and the order was put in and executed, and after that I gave instructions to Mr. Lasier to take out of the account the 250 Green Cananea and

carry it, as we call it, "paid in full," on those slates. In other words——

Q. 10. Explain that, "paid in full."

A. In other words, it was not to be considered in any transactions that were already on the books, or that might be made in the future by Mr. Gorman.

Q. 11. In other words, you had sold that stock outright to him, the 250 shares of Cananea?

A. That they had been bought in New York for his account, and, as far as our books were concerned, they were paid for.

Q. 12. And they were then considered as his property?

Mr. SILBER: I object to that.

Mr. COLEMAN: Well, strike that out.

A. Well, if he had so desired, he could have ordered the stock out endorsed in blank or he could have ordered it transferred to suit his own convenience, in his own name.

Q. 13. State if you had any conversation with Mr. Gorman, with reference to transferring that stock, to his own name on the
92 books of the Green Cananea Copper Company.

A. No, I did not.

Q. 14. Do you know what Mr. Gorman's account was called in your house?

A. It was known as "Ex No. 7."

Q. 15. Where was that account originated?

A. The orders usually came from the Railway Exchange office.

Q. 16. And then they were transmitted where?

A. To New York.

Q. 17. And then New York——

A. Executed the orders and reported back to the Railway Exchange office at the same time. The wire was a loop, not a "pony"; it was direct to the Railway Exchange office, but the head operator, as we called him in our office, took off the messages or reports as they went through on the wire.

Q. 18. Did A. O. Brown & Company in New York report to you that this purchase had been made?

A. When the report came through, the head operator would take it off the wire, and at the same time it would go right through to the Railway Exchange Operator.

Q. 19. Did the telegram come to you from the New York office, saying that they had purchased that stock for Mr. Gorman?

A. It came to both offices at the same time; it was taken by the head operator and also by the operator at the Railway Exchange office.

Q. 20. Do you know what has become of that telegram?

A. All the books, records, and telegrams were sent to the receiver in New York. Those telegrams, at the end of the day, were received from the Railway Exchange office and filed away in the vault at the Commercial National Bank office. The Receiver
93 ordered all papers of that kind shipped to New York, and that was done.

Q. 21. Under your direction?

A. Yes, sir, that is we were in charge of everything that was shipped there from the office.

Q. 22. Do you know Mr. Lasier?

A. Yes, sir.

Q. 23. What is his occupation?

A. At that time?

Q. 24. Yes; what was it?

A. He was a bookkeeper and had charge of the books in the stock department, and also kept some of the books in the grain department.

Q. 25. Did you have any conversation with him with reference to this matter or give him any directions as to carrying the account, and, if so, state such conversations?

A. I told him to put on his slate that the stock was paid for in full, and to deduct it from the amount of Mr. Gorman's balance as he carried it there, to take it out.

Q. 26. That balance was a credit balance, was it?

A. Yes, sir.

Q. 27. Did A. O. Brown & Company—was it their custom to furnish monthly statements to their clients showing the condition of the client's account?

A. It was.

Q. 28. Of the shares of stock which were carried by A. O. Brown & Company, as paid for in full by the client?

A. That is, that their monthly statement showed that?

Q. 29. Yes.

A. I could not say.

94 Q. 30. But they would render monthly statements to each client?

A. That was their custom.

Q. 31. Could you tell Mr. Olmsted from the margin sheets of your office, the condition of a client's account, with a fair degree of accuracy?

A. We could.

Q. 32. That would show a record of their transactions, would it, except as to a possible charge for interest?

A. It would. At the end of each month they sent out tissue copies of statements and they were checked against the margin sheets and any inaccuracies or anything like that were checked up, any discrepancies.

Q. 33. Now, do you know anything about the purchase by James E. Gorman, on or about August 24th, of 100 shares of Subway?

A. I do not. I was away at that time, and I know nothing of it, except that I have seen the margin slate.

Mr. SILBER: I object to what he has seen.

Mr. COLEMAN:

Q. 34. Go ahead, and answer. Just go ahead with the margin slate.

Mr. SILBER: Let the record show an objection on the part of the

trustee, to any answers of the witness, not based upon his actual knowledge of what actually took place.

Mr. COLEMAN: Let the record also show that James E. Gorman, demands from the Trustee, the margin slate in question. Now, answer the question.

The WITNESS: Can I talk with Mr. Lasier a moment?

Mr. COLEMAN: I have no objection.

Mr. SILBER: I have no objection.

95 The WITNESS (after conferring with Mr. Lasier): I would add that the margin slates are here, and I would like to send for them, and if you want to, you can offer them in evidence right here.

Mr. COLEMAN: I guess you had better send for them.

Mr. SILBER: I do not know anything about them. I did not know those records were here.

The WITNESS: They were left out by mistake. They were just the margin slates, or margin blotter, that is all. None of the books or records or anything else were omitted. That is the only thing that is left here; every scrap of paper otherwise has been sent to New York, so far as I know.

Mr. COLEMAN: Have you any objection to Mr. Dickinson identifying that slate, and attaching it to this deposition?

Mr. SILBER: I would have to see the thing before I could bind myself. I did not know that there were any such records in existence here. All of those records are supposed to be in the hands of the trustee in New York.

The WITNESS: That is the only thing that is left out, and that was left out by mistake.

Mr. SILBER: I would not be willing to stipulate that they were the original records, because I know nothing about them.

Mr. COLEMAN: Just let Mr. Olmsted identify them as the originals.

Mr. SILBER: Well, let them be brought in.

Mr. COLEMAN:

Q. 35. How long will it take to get that?

A. They ought to be over here in fifteen minutes.

Mr. SILBER: It seems to me that you will get much better evidence from the books down there, because all these transactions must be on the books.

The WITNESS: Yes, that is right.

96 Mr. COLEMAN:

Q. 36. Now, did you have any conversation with any agent of A. O. Brown & Company, or any of your employees with reference to this 100 shares of Subway?

A. No, I was not here.

Q. 37. Well, after the transaction, at any time at all?

A. In regard to it?

Q. 38. Yes?

A. No, I think not; I did not.

Q. 39. Do you know, of your own knowledge, the condition of Mr. Gorman's credit balance, just prior to August 24th, 1908?

A. I do not.

Mr. COLEMAN: Mr. Silber, pending the time that this slate is coming over, will you take the witness for cross-examination?

Mr. SILBER: Yes, certainly.

Mr. COLEMAN: And we will then resume.

Cross-examination by Mr. SILBER:

X Q. 1. You were one of the managers, as I understand it, of the Commercial National Bank office of A. O. Brown & Company?

A. Yes, sir.

X Q. 2. You had charge of the stock department principally?

A. Principally.

X Q. 3. What did you do in reference to your management of that, what was your daily course of business personally?

A. Well, the bookkeepers would keep me informed as to the status of the accounts and I would look over the books from time to time, and the margin slates, and if more protection was needed at any time, they would take the matter up with me, and I
97 would keep in general touch with the business.

X Q. 4. Did you keep an independent set of books in that office?

A. Do you mean entirely?

X Q. 5. Yes.

A. We kept what we called a blotter set of books, in regard to stocks, and we kept the grain books here.

X Q. 6. Because the grain transactions actually took place here?

A. Because the grain transactions actually took place here.

X Q. 7. And the stock transactions took place in New York, that is, the New York Stock transactions?

A. That is the New York Stocks, yes, sir.

X Q. 8. And as to those transactions, you did not keep an independent set of books here, did you?

A. No.

X Q. 9. All of those transactions were executed in New York and the entries were made on the books in New York?

A. Yes, sir.

X Q. 10. And statements of account were made out and sent from the New York office?

A. Yes, sir.

X Q. 11. The Commercial Bank Office had nothing to do with those transactions independently?

A. Except to put the orders in and get the reports and report them to the clients.

X Q. 12. When you made a sale for cash, how did you do it with reference to the New York office? Supposing a customer gave you an order to buy 100 shares of Amalgamated Copper stock for cash. What did you do in the Commercial Bank office?

A. We figured the amount that was necessary to pay
98 and received a check which was deposited to the credit o
A. O. Brown & Company, in the Commercial National Bank
X Q. 13. That money was then sent to New York later?
A. I do not know.
X Q. 14. You had nothing to do with the financial transactio
itself, personally?
A. We deposited that money to the credit of A. O. Brown
Company. We notified them that the money had been deposited
and then we ordered the stock out for the account.
X Q. 15. Now, when stock was bought in that way for cash, th
customer had the privilege of having the certificates surrendered t
him by A. O. Brown & Company, or A. O. Brown & Company woul
carry it, just as the customer chose, is that right?
A. Yes, sir.
X Q. 16. In your statement, which you sent to the customers, i
regard to those transactions, you yourself, did not see the statement
before they emanated from New York?
A. Well, that was the general custom.
X Q. 17. The course of business?
A. Yes, sir.
X Q. 18. That is what I mean. When you say that you directe
Mr. Lasier to note that the purchase price of this stock, that yo
have testified to (this Green Cananea stock) had been paid, yo
meant by that that you simply called his attention to the fact tha
there was sufficient credit balance so that no cash need to pass?
A. And that the amount was to be deducted and not to be co
sidered as a protection against any other trade? In other words
that that was taken out of the account?
99 X Q. 19. That would have to be done in the New Yor
books anyhow, would it not, when the trade went throug
that office in New York?
A. The amount would have been deducted?
X Q. 20. Yes.
A. Not necessarily, if it was an open account.
X Q. 21. Well, if no cash was paid the New York office woul
exhaust as much of the credit balance as it needed to to make th
payment, would it not?
A. If it was a running account, why it would simply be charge
into the account, that amount of money.
X Q. 22. As a debit item?
A. Yes, sir.
X Q. 23. And that would be taken out of the credit balance o
the account down there?
A. I do not know about their method.
X Q. 24. You do not know what they would do about it?
A. I do not know what their method would be.
X Q. 25. Your purpose in giving Mr. Lasier that informatio
was simply for the benefit of your margin records here?
A. Well, we had been notified from New York that the stock mu
be paid for in full.

X Q. 26. You considered that it was paid for when you told Mr. Lasier to deduct it from the balance shown on the margin slate?

A. As far as we were concerned, yes, sir.

X Q. 27. It was simply then, as I said before, for the benefit of your record as to the margin that you had available on that account, that you gave Mr. Lasier this information?

A. Simply to keep our books straight, and as the New York office had instructed us that the stock must be paid for, we deducted it out in full from the account.

100 X Q. 28. The deduction which you made here in your records is what you know about. You do not know in reference to the records of the New York office, or what the state of the account was, as it was kept there?

A. No.

X Q. 29. Did you notify the New York office in any way as to what you had done with your margin record here?

A. It was not the custom to do that.

X Q. 30. You did not ordinarily give the New York office such information, did you, because they had a complete record of their own?

A. They had a complete record.

X Q. 31. When the New York office notified you that this order would not be carried on margin, it was then up to you to get the cash or its equivalent for it, was it not?

A. Or deduct it from the account, if it was sufficient to take care of it.

X Q. 32. But when the New York office told you that it would not carry the account, since the books were kept in New York, it was up to you to get the cash or its equivalent if New York wished it, was it not.

A. Or deduct it from the account. When they notified us we notified our customer that stocks of that character they would not carry on a margin.

X Q. 33. But you were not keeping a set of books here that governed that account?

A. We kept a set of books though whereby we knew how our clients stood.

X Q. 34. Generally?

A. Those accounts were checked with New York at different times, sometimes every day to find out if there were any discrepancies.

X Q. 35. Now, this order or this telegram of confirmation
101 which came from New York, do you remember the precise language of that telegram?

A. I do not.

X Q. 36. It was one of a great number that came during that day?

A. Yes, sir.

X Q. 37. Do you know whether this exact telegram, this identical telegram, was sent back to New York?

A. I know it of my own knowledge; that is, I know that they were all sent back.

X Q. 38. As a general proposition?
A. Yes, sir.
X Q. 39. You did not see this particular one among those t
were sent back?
A. No.
Q. 40. You did not send them back yourself?
A. No.
X Q. 41. You say that there are certain original records
here, the margin slates. How many of those records are there he
A. I think there are two slates, grain and stocks, as I recall.
X Q. 42. Are they exclusively in connection with Mr. Gorm
accounts, or are there other accounts?
A. No, there are other accounts.
X Q. 43. Who was it that did send the records back to New Y
after the failure?
A. Why, Mr. Noyes, I think, and they were put up by
porter.
X Q. 44. How did it happen that these two were not includ
A. I do not know, they were left out someway.
X Q. 45. When was it discovered that they were left o
102 A. I have forgotten now.
X Q. 46. Have they been here for sometime that
know of?
A. Yes, sir.
X Q. 47. Has it been known that they were here for so
time?
A. I think so.
X Q. 48. Is there any reason why they have not been sent b
to New York, that you know of?
A. Why the only reason was that some of our customers wan
to know how their accounts stood, and we simply had to let th
know, that is all.
X Q. 49. Did you keep those records here for that purpose?
A. No.
X Q. 50. When you say "our customers" do you refer to A.
Brown & Company's customers, or Farson's customers?
A. The Chicago clients.
X Q. 51. You mean the customers of Brown & Company, or
customers of Farson & Son Company's?
A. No, A. O. Brown & Company.
X Q. 52. You have not been connected with the Receiver of A.
Brown & Company in any way since the failure, have you?
mean, you have not been working for him?
A. Why, he wanted us to close up the grain books, that is
X Q. 53. How long did it take you to do that after the failu
A. I think about four days.
X Q. 54. And since that was done you have not had any furt
connection with the estate?
A. No.

Mr. SILLER: That is all for the present.

103 Mr. COLEMAN:

Q. 1. As far as you know, Mr. Olmsted, everything excepting the margin sheets or slates were sent back to New York?
A. Yes, sir.
Q. 2. They are not here in Chicago in your office?
A. No, sir. Everything else was sent that I know of.
Q. 3. They are not in your office?
A. No, sir.

Redirect examination by Mr. COLEMAN:

R. D. Q. 1. I hand you a book marked Petitioner's Exhibit A and ask you what it purports to be, if you know?
A. It is what is called a margin slate that was used by A. O. Brown & Company.
R. D. Q. 2. During what period was it used by A. O. Brown & Company?
A. The years 1907 and 1908.
R. D. Q. 3. During the time that they operated?
A. So far as I know, yes, sir.
R. D. Q. 4. Now, did you have occasion to consult this margin book at times?
A. I did at the time.
R. D. Q. 5. You know that this is the margin book which was used to record the transactions of that period?
A. At that time, yes, sir.
R. D. Q. 5½. Have you ever had occasion to check it up or examine it, as to its correctness?
A. No, just simply to look it over as it was kept.
R. D. Q. 6. Do you believe it to be true and accurate?
A. I do.

R. D. Q. 7. Now, I call attention to the item marked "7
104 J. E. Gorman," and ask you if you can identify that as one of the documents of A. O. Brown & Company?
A. I can.
R. D. Q. 8. Have you seen that before?
A. I have.
R. D. Q. 9. So far as you know has there been any change in that record from the time it was made up to the date of the bankruptcy or after the date of the bankruptcy—has that been changed since the bankruptcy?
A. Not so far as I know.

Recross-examination by Mr. SILBER:

R. X Q. 1. When did you first discover that this book had not been sent to New York?
A. Why, I think it was after the books—the boxes had been nailed up.
R. X Q. 2. Can you explain why it was not sent then when you discovered it?
A. I presume it was left in the drawer or something of that kind, and was then left there.

R. X Q. 3. When was it found again?

A. I could not say as to that.

R. X Q. 4. How long have you known that it was in tha drawer or wherever it was kept?

A. It might have been some time in September.

R. X Q. 5. Why did not you then see that it was sent to M Littlefield in New York?

A. Well, I did not think it was of any particular value for th reason that he already had what was called "the blotter ledger here, that was kept by the bookkeeper, which gave the accounts i full.

R. X. Q. 6. This book was one of the private financial records o A. O. Brown & Company, was it not?

A. Well, not particularly, because the ledger account—we kept blotter ledger here.

105 R. X Q. 7. This contained the names of their customers

A. We have got the names of their customers in the blo ter ledger, which was practically this book and was forwarded t New York. In fact it was more of a record than this was.

R. X Q. 8. Do you know who has had the physical charge o this book since September, 1908?

A. Why it has been—it was brought over into the vaults of Fa son's, and put into the vaults.

R. X Q. 9. Are you able to swear that no entries have bee made in this book since September, 1908?

A. No.

R. X Q. 10. You do not know anything about it, do you?

A. It was simply put in the vault there, that is all.

R. X Q. 11. It has been left to the mercy of anybody that migh want to take hold of it?

A. Simply been placed in the vault there.

R. X Q. 12. Nobody was prevented from having access to it, i they wanted to?

A. Not so far as I know.

R. X Q. 13. You are unable to swear that no other entries hav been made in this book since August 25, 1908?

A. No, I could not swear to it.

R. X Q. 14. You are unable to say that this book is now in th same condition it was on the day of the failure, are you not?

A. To the best of my knowledge and belief it is.

R. X Q. 15. You do not know anything about it, do you?

Mr. COLEMAN: Now, wait a moment. Let him answer.

Mr. SILBER: I want him to answer. You can make your objec tion on the record.

106 A. To the best of my knowledge and belief it is the same

R. X Q. 16. Yes, but my question is this: You do no actually know what was done with this book since that time, d you?

A. No.

Mr. COLEMAN: I object to that, that has been gone over several times.

Mr. SILBER:

R. X Q. 17. You do not know whether entries have been erased and new entries made since August 25, do you?
A. Not of my own knowledge.

Mr. SILBER: That is all.

Re-redirect examination by Mr. COLEMAN:

R. R. D. Q. 1. With reference to the vault; was that open to the access of anyone but your own employés?
A. No.
R. R. D. Q. 2. You stated that it was open to everybody. You meant just to your own employés?
A. To the employés of Farson.
R. R. D. Q. 3. When the office was closed at night what would you do with the vault?
A. It was locked up.

Mr. SILBER:

R. X Q. 18. How many employés were there in that office?
A. In Farson's?
R. X Q. 19. Yes.
A. I could not say.
R. X Q. 20. How many about?
A. Possibly 15.

Mr. COLEMAN:

R. R. D. Q. 4. Does every employé go into the vault?
A. No.
R. R. D. Q. 5. Just a few?
107 A. Possibly six altogether.

Mr. COLEMAN: That is all.

And further deponent sayeth not.

____ ____.

Subscribed and sworn to before me this 25th day of January, A. D. 1909.

____ ____,
Notary Public.

CLARENCE LASIER, a witness produced on behalf of the said petitioner, being first duly sworn, deposes and says, as follows:

Direct examination by Mr. COLEMAN:

Q. 1. Please state your name, age, occupation and place of residence.
A. Clarence Lasier; 33 years of age; residence 547 Washington

Boulevard. In charge of the grain and stock accounts of Farson, Son & Company.

Q. 2. How long have you been employed in that capacity?

A. Since September 15th, last September.

Q. 3. 1908?

A. 1908.

Q. 4. What was your occupation just prior to that?

A. I was with A. O. Brown & Company from January 6th, 1907, to the date of their suspension, August 25th, 1908, overseeing stock and grain accounts of their clients and customers in the Railway Exchange and Commercial National Bank Building office.

Q. 5. You had charge of their accounts?

108 A. Yes sir.

Q. 6. Do you know anything with reference to a purchase by James E. Gorman of 250 shares of Green Cananea stock about April 14, 1908? If so, state what you know about it, if you know anything?

A. During the month of April, 1908, the New York office reported that they had bought 250 shares of Green Cananea stock for Ex No. 7, which was for Mr. James E. Gorman.

Q. 7. Ex No. 7 meant his account?

A. His account.

Q. 8. Proceed.

A. I entered the trade on the margin slate and marked it as being paid for, deducting the amount of the cost of the stock from his credit which appeared on the margin slate, and that would leave his stock fully paid for.

Q. 9. Was it so marked?

A. It was so marked on the margin slate.

Q. 10. After the bankruptcy of A. O. Brown and Company, what if anything, became of the records?

A. They were all packed up, and put in packing cases and sent to the receiver.

Q. 11. Were there any exceptions? You say all. Was anything left out?

A. With the exception of these margin slates, and they were left out for some reason or other—I do not know what. They were forgotten. The porter packed them up, and there was considerable confusion at the time.

Q. 12. Were telegrams, messages and orders included in what was sent?

A. Yes sir.

Q. 13. Were these packed under your supervision?

A. No.

109 Q. 14. State what you had to do with the packing of them?

A. I did not have anything to do with the packing of them at all. There were five or six cases and the colored porter was told where the things were to be taken out of the vault and the different desks and he placed them in the cases and nailed the cases up and took them over to the freight office.

Q. 15. Now, with reference to the custom of A. O. Brown &

Company as to advising their clients of the condition of their respective accounts, did they send from the New York office statements to their clients?

A. They sent them monthly statements.

Q. 16. Those statements would show what?

A. They would show the exact condition of the account, their purchases and sales and all the stocks they were "long" of, or "short" and we received tissue copies of those statements.

Q. 17. Would they show what stocks were held for a client?

A. Yes sir.

Q. 18. They would?

A. Yes sir.

Q. 19. Now your accounts kept over in the Commercial National Bank Building, to what extent were they checked with the accounts of the New York office?

A. At the end of every month we received tissue copies of the monthly statements, sent to the customers and at the end of every week or every two weeks, we would send a copy of our margin slate to the New York office.

Q. 20. Now, if a transaction occurred anywhere else, which would affect the balance of a client, would you be advised of it by the New York office?

A. Yes sir.

110 Q. 21. That was the general custom?

A. Yes, sir.

Q. 22. Now what do you know with reference to the purchase of 100 shares of Subway stock for James E. Gorman, on or about the 24th day of August, 1908?

A. There was a report came in showing that they had bought 100 shares of Chicago Subway stock for "Ex No. 7" which was Mr. James E. Gorman, and I entered that on the margin slate and marked it "paid for."

Q. 23. Where did that report come from?

A. That came off the wire.

Q. 24. Was that a private wire?

A. That was a private wire.

Q. Connected with what house?

A. With A. O. Brown & Company's New York office, and all their branch offices.

Q. 26. Do you know who transmitted the order, what individual?

A. No, I do not know. It was some operator that they had down there.

Q. 27. State how you handled that account. How did you handle that account, Mr. Lasier, after receiving the order?

A. I put the 100 Subway on to the margin slate and deducted it from the credit which was on the slate.

Q. 28. Now, was there a sufficient balance to take care of the purchase of that 100 shares?

A. There was, according to my slate.

Q. 29. How did you mark that stock as carried?

A. As being fully paid for.

Q. 30. And the property of James E. Gorman?

Mr. SILBER: That is objected to.
Mr. COLEMAN: Well, strike that out.

111 Q. 31. Whose property was that stock marked as?

Mr. SILBER: I object to any testimony as to how it was marked, or as to whose property it was marked, as being a conclusion of law.

Mr. COLEMAN:

Q. 32. What does your record show? Did it show that that was carried for James E. Gorman?
A. Yes, sir.
Q. 33. When I said "carried" and you answered that question, you mean by that held as his own property?

Mr. SILBER: That is objected to.

Mr. COLEMAN:

Q. 34. Well, strike that out, and explain what you mean.

Mr. SILBER: Let me put my objection on the record. I desire to object to any testimony of the witness as to what a record shows or as to what the books show, the books being the best evidence.

Mr. COLEMAN:

Q. 35. Now, you may answer, and explain what you mean by "carried."
A. On the slate it is marked "Ex. #7 J. E. Gorman, long, 100 Chicago Subway" and after it is marked "paid for," and in determining any other transaction that we might make, that transaction would not be considered at all.
Q. 36. What does that mean? Who owns the stock?

Mr. SILBER: I wish to interpose the same objection to that question. That is the issue to be tried in this case.

112 Mr. COLEMAN:

Q. 37. What does that mean in plain English, what did it indicate?
A. J. E. Gorman owns the stock.

Mr. SILBER: I move to strike out the answer on the ground that it is a conclusion, and involves the very issue in this case.

Mr. COLEMAN:

Q. 38. Well, you may state what your house understood in the usual course of business by an entry of that kind, "paid in full."

Mr. SILBER: I object to what "the house understood," as that is not competent, and the question deals directly with the issue in this case, the question of the ownership of the stock being the subject of this petition.

A. They understood that the stock was fully paid for.

Mr. SILBER: I move to strike out the answer on the same ground.

Mr. COLEMAN:

Q. 39. In who would you understand that to vest the ownership of the stock?

Mr. SILBER: Just a moment before you answer that question. I make the same objection, on the ground that it is a conclusion of law and involves the issue in the case. Let him answer it any way he wants to.

A. J. E. Gorman.

Mr. SILBER: I now move to strike out the answer.

Mr. COLEMAN:

Q. 40. Now, that was the general understanding in the trade, was it, at the time?

113 Mr. SILBER: The same objection to that.

A. Yes, sir.

Mr. SILBER: I now move to strike out the answer.

Mr. COLEMAN:

Q. 41. I now hand you for identification Petitioner's Exhibit A, and ask you what that purports to be?

A. That is the margin slate of A. O. Brown & Company, of their customers' accounts in the Commercial National Bank Building office and the Railway Exchange office.

Q. 42. What period does that cover?

A. Well, the slate was started at the time A. O. Brown & Company entered into business here in Chicago, and it covers the time up to the date of their suspending.

Q. 43. In whose handwriting is that?

A. Well, the majority of those entries are in my handwriting.

Q. 44. I call your attention to an item marked No. 7 and ask you in whose handwriting that is?

A. That is in my writing.

Q. 45. Now, how was that prepared? From what information would you prepare that statement?

A. The moment we received a telegram from New York over the private wire showing that they had bought 250 shares of Green Cananea stock for Mr. Gorman, the first thing I did was to enter it on this slate and then I made out a memorandum of purchase and sent it to Mr. Gorman.

Q. 46. Now, you know that to be true and correct, do you?

A. To the best of my knowledge and belief.

Q. 47. You knew it to be true and correct at the time you made it?

114 A. Yes, sir.

Q. 48. This information which you had received, would

that come—from what office would that come, that 250 shares of Green Cananea had been bought?

A. From the main office in New York.

Q. 49. From the main office in New York?

A. Yes, sir.

Q. 50. And you were accustomed to receive such information daily in the usual course of business?

A. Yes, sir.

Q. 51. And that information generally was correct, was it?

A. Generally, yes, sir.

Q. 52. Now, I ask you to read into the record this account of J. B. Gorman, "Ex. #7," with reference to 250 shares of Green Cananea stock, and explain what it means.

A. How do you mean this, just to read the account?

Q. 53. Yes.

A. "Ex. #7, J. E. Gorman, long 250 Green Cananea 8¼ paid for." I should say that the cost of that was deducted from that amount, that is the margin.

Q. 54. Just explain that.

A. The cost of the Green Cananea,—I haven't got the figures now—was deducted from his margin credit whatever it was at that time. "Long 100 Subway."

Q. 55. Now, just before we get to the Subway. Right after the words "250 Green Cananea" appear these letters: "Pd. for." What does that mean?

A. That means——

Q. 56. Just state what it is. "Pd." stands for what?

A. Paid.

115 Q. 57. Paid for?

A. Paid for.

Q. 58. I call your attention to the second line of that account, and ask you to read that into the record.

A. (Referring to book.) "Long 100 Subway 23¾ paid for."

Q. 59. What does "pd. for" mean?

A. It means that the——

Q. 60. Just state what it means?

A. Paid for.

Q. 61. At the head of the page appears the word "long."

A. That means stocks bought.

Q. 62. Actual purchases or margin transactions?

A. All transactions.

Q. 63. What was this particular purchase?

A. What do you mean?

Q. 64. What does that "long" mean? Speculation, does that mean a purchase on margin, or a real out and out purchase?

A. It means stocks carried on margin, and an out and out purchase also.

Q. 65. It means both?

A. Yes, sir.

Q. 66. That is just a term of convenience in your books?

A. Well, it means bought.

Q. 67. Now, by what method do you ascertain that this was a real purchase? Is there anything on that memorandum to so indicate?
A. That it was a real purchase?
Q. 68. That it was a real purchase?
A. All stocks that are bought, the actual certificates are delivered.
Q. 69. So that with this word "paid for" it indicates that
116 this was an out and out purchase of certificates?
A. Yes, sir.
Q. 70. That would be the way you would ascertain that?
A. Yes, New York bought the stock and it was delivered to them and it is in their office in New York, or should be.
Q. 71. Subject to the client's order?
A. Yes, sir.

Mr. COLEMAN: Petitioner now offers in evidence, the document identified heretofore, as Petitioner's Exhibit A, and asks that it be attached to this deposition.

The said document so offered in evidence by Petitioner, is marked "Petitioner's Exhibit A" and is attached hereto and made a part hereof.

Cross-examination by Mr. SILBER:

X Q. 1. This book that you have been looking at in reference to these transactions, how long has it been in your office?
A. Since January, 1907.
X Q. 2. You have known it was there since that time?
A. When the firm opened up their office in Chicago.
X Q. 3. I mean since the failure, how long has it been in your office?
A. Why, I think just prior to our leaving the Commercial National Bank Building Office, they were discovered and we took charge of them because the customers' accounts are in there. We did not want to leave them lying there.
X Q. 4. This was one of the most private records of the firm, was it not?
117 A. Yes, sir.
X Q. 5. Why was it that you did not send it to the Receiver at the time you discovered it?
A. Well, that I do not know.
X Q. 6. Did anybody tell you not to?
A. No.

Mr. COLEMAN: Just a moment. We will enter an objection to that, Mr. Silbert, it is not material to this case.
Mr. SILBER: I am willing that you should enter any objection you see fit in the record.

Mr. SILBER:

X Q. 7. Did anybody tell you not to send it forward?
A. No, sir.
X Q. 8. Nobody told you to keep it here?
A. No.

X Q. 9. You had sent everything else that belonged to the esta to the Receiver?

A. Yes, sir.

X Q. 10. You mean that this was one of the important book kept in the Commercial National Bank office?

A. Yes, sir.

X Q. 11. And you say you have no explanation to make as why this was not sent forward?

A. I have none, no.

X Q. 12. Who besides yourself knew that this book was here, r maining here?

Mr. COLEMAN: That is objected to.

A. The managers knew it, Mr. Noyes and Mr. Olmsted.

Mr. SILBER:

X Q. 13. Did anybody besides Mr. Noyes and Mr. Olmsted

118 A. I believe the rest of the boys around the office knew of i

X Q. 14. Was the matter of sending it forward to the R ceiver or trustee ever discussed between the former employés of A O. Brown & Company?

A. No.

X Q. 15. When was the first time that it was suggested, as far this hearing is concerned, that this book was here?

A. Why, when we left the Commercial National Bank office w took the books with us. As long as they were left out, we took the over here.

Mr. COLEMAN: Now just a moment. I move to strike that ou as not responsive.

Mr. SILBER:

X Q. 16. This book contains the names, as I understand it, the customers who did business with A. O. Brown & Company i these offices.

A. Yes, sir.

X Q. 17. And contains entries relative to orders that they gave

A. Yes, sir.

X Q. 18. And also entries relative to the margins that the maintained on their accounts?

A. Yes, sir.

X Q. 19. Since September, 1908, you have been working for Fa son, Son & Company?

A. Yes, sir.

X Q. 20. This book has been in the office of Farson, Son & Com pany since that time?

A. We had it over there for safe keeping. It was in the vaul just merely taken over there with other effects.

X Q. 21. And has been there until produced here on the hea ing of these depositions to-day?

A. Yes, sir.

119 X Q. 22. Who besides yourself made entries in this book

A. Another young man when I was away on my vacatio

X Q. 23. What was his name?
A. Mr. Frank Murphy.
X Q. 24. Where is he now, do you know?
A. He is with Noyes & Jackson.
X Q. 25. Noyes was the former manager of A. O. Brown & Company?
A. Yes, sir.
X Q. 26. Who is Mr. Jackson, was he connected with them also?
A. No, sir.
X Q. 27. Where is their office?
A. In the Commercial National Bank building.
X Q. 28. I call your attention to these items which you have read from, under the name of Mr. J. E. Gorman, and I ask you to examine the book from which you testified when you gave your evidence upon the direct examination, and tell me how much margin Mr. Gorman had upon his account at the date when this entry with regard to the 250 shares of Green Cananae 8¼ "Pd. for" was made, in this book?

Mr. COLEMAN: I object to that, because the record is the best evidence. If he wishes to testify regardless of his record, you may frame your question that way.

A. $1,200—you mean after the stock was paid for?

Mr. SILBER:

X Q. 29. No, before the stock was paid for.
A. Why I will have to figure it out. I have taken it from that. (Referring to book.)
120 X Q. 30. Then this item of $1,200 in the column marked "margin," as I understand you, is the net amount left as margin after deducting the purchase price of the Green Cananea stock?
A. Yes, sir.
X Q. 31. And also the purchase price of the Subway stock?
A. Yes, sir.
X Q. 32. How much was the margin left after the deduction of the Green Cananea item? Can you answer that from this record?
A. If you will just add $2,175 to the amount, you could get it.
X Q. 33. Would these two items in the column marked "short" "100 Southern Pacific," "100 Atchison," have anything to do with the question of the amount of that margin?
A. Yes, it would show the margin on those stocks.
X Q. 34. So that until you compute the amount of the margin with reference to those two items that I have last mentioned, you would not be able to say from this record how much margin he had when you bought the 250 Green Cananea, would you?
A. Well here, he bought this 250 Greene Cananea in April, 1908.
X Q. 35. Where does that appear on the record?
A. Only from what you said here.
X Q. 36. Where does it appear on the record?
A. It don't appear on that record.

X Q. 37. So that you are now relying on your memory when yo
say that?

A. Only what was said here that there was 250 shares bough
during the month of April.

X Q. 38. You are relying on your memory for that date?

A. Yes, sir.

121 X Q. 39. The record does not disclose any dates at all o
any transactions?

A. No, not in this book.

X Q. 40. So that you could not tell from the entries in this recor
how much of a margin Mr. Gorman had at the time you bough
the 250 shares?

A. I was just about to explain to you that during the month
April this price had been fluctuating back and forth all that tim

X Q. 41. Yes.

A. I could not tell you exactly the amount of margin he had f
that reason.

X Q. 42. Is there not another reason for which you are unab
to tell?

A. How much money he had?

X Q. 43. Yes.

A. Well, there may have been some stocks that he was long
short which had been closed.

X Q. 44. The fact that he was short 100 Southern Pacific at son
time, probably about the same time, from this entry in the colum
marked "short," would have something to do with the amount
that margin, would it not?

A. Why, yes.

X Q. 45. And also the fact that he was short 100 Atchison woul
have something to do with it?

A. Not at that time. He probably didn't sell those stocks until-
I don't know; may be a few days before he bought the Subway.

X Q. 46. When were the words "Pd. for" placed opposite the
two items first on this record?

A. At the time they were entered in the book.

X Q. 47. When were these entries made in the book?

A. The day that New York reported them bought for Mr. Go
man.

X Q. 48. When was that, do you know?

122 A. The exact date I do not recollect.

X Q. 49. You would have to draw on your memory f
that if you testified?

A. Yes, sir.

X Q. 50. Where a customer ordered you to execute some ord
and paid you the money for the stock at the time he gave you t
order, what entry would you make in this record?

A. The same as that.

X Q. 51. The word- "Pd. for" just as you did there?

A. I don't know, may be there are some others here. (Referrin
to book.)

X Q. 52. It would make no difference, would it, whether he pa

you the money in cash, or whether you carried him upon a margin account or upon a general credit balance?

A. Why, if a man had a large credit balance we would just simply—all stocks bought are charged to the account, anyway.

X Q. 53. I understand that. All the orders that you executed appeared in the accounts?

A. Yes, sir.

X Q. 54. Whether a man pays for them or you carry the trade on a margin?

A. Yes, sir.

X Q. 55. He puts up something and the balance due you is a credit upon his account?

A. I don't quite understand that question.

X Q. 56. When he trades on margin he puts up some money?

A. Yes, sir.

X Q. 57. And the balance is carried as an indebtedness against him?

A. Yes, sir.

X Q. 58. On your accounts?

A. Yes, sir.

123 X Q. 59. When was it that this item of 100 Subway was placed in this book? Do you know the date?

A. I do not know the date, but the date it was reported bought by New York.

X Q. 60. To whom was the order given to buy 100 Subway?

A. That I do not know.

X Q. 61. Who told you that the 100 Subway was paid for?

A. Had been paid for?

X Q. 62. Yes.

A. I had instructions not to carry those stocks on margin, and when I entered it on the book I marked it as paid for, following instructions.

X Q. 63. How did you know that it was paid for, that is what I am getting at?

A. That is $2,175—suppose he had $3,375, he had enough money to pay for it, and I would simply deduct the cost of the stock from that amount and mark it paid for.

X Q. 64. Do you know that before that 100 Subway was bought, this figure in the column marked "margin" was more than $1,200?

A. Yes, sir.

X Q. 65. How do you know that?

A. I know that I would not have marked that paid up there.

X Q. 66. It is simply because you have marked that "pd. for" there that you know that the margin was more than $1,200 before the Subway was bought?

A. Yes. I am banking on the correctness of it.

X Q. 67. On the correctness of your general system there?

A. Yes, sir.

124 X Q. 68. You don't remember the particular transaction?

A. Oh, no; I had too many of them.

X Q. 69. You do not know to whom the order for the Subw
was given by Mr. Gorman?

A. No.

X Q. 70. The only thing you had to do with it, then, was to ma
it upon this margin record when you got the wire from New Yo
that the order had been filled?

A. Yes, sir.

X Q. 71. And because they refused to carry the Subway on
margin, you marked the words "pd. for" in that column?

A. Yes, because there was money enough there to take care of t
purchase.

X Q. 72. The amount of money that was there you are unable
say?

A. I cannot say now.

X Q. 73. Do you remember ever seeing a statement of Mr. G
man's account after these transactions?

A. After the Green Cananea, yes. Not the original stateme
but I have seen the tissue copy of the statement.

X Q. 74. Do you remember what that statement showed in deta

A. No, I could not state that.

X Q. 75. Do you remember seeing a copy of the statement af
the purchase of the Subway?

A. No.

X Q. 77. There was no time to get one in?

A. No.

X Q. 77½. That was the day before the failure?

A. I believe so, it was very close to it.

X Q. 78. You never received in the Commercial Ba
125 office the actual shares of stock upon either of these tra
actions?

A. No.

X Q. 79. You do not know what the numbers of the certifica
were?

A. No.

X Q. 80. Your records there do not disclose on either of th
transactions what the certificate numbers were?

A. Not on those transactions.

X Q. 81. You do not know what the books in New York disclo
as to what was done with regard to those transactions?

A. No.

Redirect examination by Mr. COLEMAN:

R. D. Q. 1. You have used the words "credit balance" and h
stated that a purchase would be charged against a man's credit
ance. If the client had a credit balance with the firm of A.
Brown & Company it would indicate that the company would o
the client some money?

A. Yes, sir.

R. D. Q. 2. And if there was enough money that A. O. Brow
Company owed the client, more than the price of the stock, which

was intending to purchase, that would be a charge against what A. O. Brown & Company owed him?

A. Yes, sir.

R. D. Q. 3. And that was done in all these cases?

A. Yes, sir.

R. D. Q. 4. And you remember that at the time there was enough?

A. Yes, sir.

R. D. Q. 5. Now, you stated that the reason you knew that there was enough, was because you had marked "Pd for" on the book?

126 A. Yes, sir.

R. D. Q. 6. Isn't what you meant to say that the reason you marked "Pd. for" on the book was because at that time you knew that there was enough in the credit balance to take care of the purchase?

A. Yes, sir.

R. D. Q. 7. Isn't that the way you intended to explain?

A. Yes, sir.

R. D. Q. 8. These entries were made at the time the transactions occurred?

A. Yes, sir.

R. D. Q. 9. At the very same time?

A. Yes, sir.

R. D. Q. 10. And that was before the failure of A. O. Brown & Company?

A. Yes, sir.

R. D. Q. 11. Has that book been changed at all, that account or that book since the day you made the entry?

A. Since the day that I made the entry, well, for instance, I will try to explain that. The 250 Green Cananea was entered—that deal was made you say in April some time, 1908?

R. D. Q. 12. Yes.

A. Well, this is a silicate slate and it gets dirty, and we used to clean it off maybe once or twice every so often, I don't know, and sometimes maybe in May I may have cleaned this slate and rubbed out the original entry I made there, but that was put back right there again.

R. D. Q. 13. If you did rub out the 250 Green Cananea, you cleaned the slate and put it right on again?

A. Yes, sir.

R. D. Q. 14. So that that is unchanged now; it is not different than it was when originally made?

A. No.

127 R. D. Q. 15. Now, there has been no change at all since the bankruptcy?

A. No.

R. D. Q. 16. You have made no entry in that book at all?

A. No.

R. D. Q. 17. Nor cleaned it?

A. No, it is just exactly the same.

R. D. Q. 18. These tissue copies of statements which you stated you received, those were copies on tissue paper of the statements which would be sent from the New York office direct to the client, were they not?

A. Yes, sir, impression copies.

Recross-examination by Mr. SILBER:

R. X Q. 1. At the time you made these entries, "pd. for" upon these two items, you did not know what the books of A. O. Brown & Company actually showed as to the state of Mr. Gorman's account in New York, did you?

A. No. They may have had some other customer's account, with part of his trades in it, so far as I know.

R. X Q. 2. You would not have any means of knowing that at that time?

A. No. The only thing I would know is that at the end of the month, when they sent their statement, that was supposed to be an exact duplicate of the ledger, and these tissues agreed with our books.

R. X Q. 3. You don't remember now any particular statement that you checked over with these particular items, do you?

A. No particular one. I know that I have received tissues of that Green Cananea.

128 R. X Q. 4. Do you know that you never received a tissue of the other item, though?

Mr. COLEMAN: That is objected to. Let him finish his answer.

Mr. SILBER:

R. X Q. 5. Finish your answer.

A. I was going to say that I never received a tissue of that last item of Subway.

R. X Q. 6. You know that you did receive some tissue statement at the end of the month upon which the other item of 250 shares did appear?

A. Yes, sir.

R. X Q. 7. This slate you say is frequently changed, that is, the items are rubbed out when they accumulate and are replaced?

A. Yes, sir.

R. X Q. 8. Supposing that the stock certificate in question for the 250 shares had actually been delivered to Mr. Gorman, what would have become of this entry on this slate?

A. Erased off of there.

R. X Q. 9. You would have done that personally?

A. Yes, sir.

R. X Q. 10. Supposing someone else had delivered it in the office, then what would you have done, what would have happened?

A. I did not deliver the certificates personally myself.

R. X Q. 11. Who did deliver them?

A. The cashier would deliver the certificate and the report that

New York would send along with the stock would be turned over to me, and I would erase off my slate according to these records.

R. X Q. 12. So far as you were personally concerned, you
129 do not know whether Mr. Gorman ever gave your house an order for 100 shares of Subway or not, do you?

A. I do not know as he gave the order, but I know that New York wired that he had bought that 100 Subway for "Ex. # 7," which was Mr. Gorman.

R. X Q. 13. But of your personal knowledge you do not know a thing about the transaction, do you?

A. Why, no.

R. X Q. 14. All you know is what other people have told you and what you saw done or what you put down on this blotter here in front of you?

A. That is right.

R. X Q. 15. And the same is true of the other item, of the Green Cananea item, is it not?

A. That is true.

Re-direct examination by Mr. COLEMAN:

Re-R. D. Q. 1. You stated on your recross-examination that you would have no knowledge of the books of the New York office. Now, would you not have in your own office a copy of the account?

A. Yes, sir.

R. R. D. Q. 2. And if any change was made in it, by the purchase through your office or the sale through your office, you would have a record of that in your office?

A. Yes.

R. R. D. Q. 3. Now, if any change was made through the New York office, or some different house of A. O. Brown & Company, in a different city, they in turn would advise you of it, would they not?

A. Yes sir.

R. R. D. Q. 4. So that when you said that you had no knowledge of the books of the New York house, you meant that you could not tell to a penny, or had never seen those books, but nevertheless that your Chicago books showed the same thing practically as the New York books, at all time?
130

Mr. SILBER: I object to that question as leading, and on the ground that counsel is now testifying, instead of the witness; and on the ground that it is an attempt to explain something that is perfectly evident from the witness' answer, and that it is not proper re-redirect examination.

(R. R. D. Q. 4 was then read by the reporter.)

A. Yes sir, that is right.

Mr. SILBER: I now move to strike out the answer.

Mr. COLEMAN:

R. R. D. Q. 5. You stated on recross-examination that you had no personal knowledge of this matter. Did you not receive a direct

order from the New York House to purchase this stock, and to charge Mr. Gorman's account with this stock?

A. Well, I stated that we had received a wire from New York, stating that they had bought 250 Green Cananae for Ex. No. 7.

R. R. D. Q. 6. Yes.

A. Which was Mr. J. E. Gorman, and we would charge it to his account.

Recross-examination by Mr. SILBER:

R. X Q. 16. Did the telegram ask you to charge it to his account?

A. In the custom of the business we would do it.

R. X Q. 17. You are testifying now as to the general custom?

A. We would have to charge it to something.

R. X Q. 18. You just testified that the telegram said that you should charge it to his account. You did not mean that?

131 A. No.

R. X Q. 19. You meant you got a telegram that they had bought it?

A. Yes, sir.

R. X Q. 20. And that is all it said; that they had bought this stock for Ex. No. 7?

A. Yes, and then of course we knew what to do; we knew it was to be charged to his account.

R. X Q. 21. Everything for your information not in the telegram was a matter of the custom of the business?

A. Yes sir.

R. X Q. 22. And your testimony is not meant to say anything else?

A. That is all.

Mr. COLEMAN:

Q. When you say "the custom of your business" you mean orders from the house of A. O. Brown & Company in New York—with reference to those orders?

A. Yes sir.

And further deponent sayeth not.

____ ____.

Subscribed and sworn to before me this 25th day of January, A. D. 1909.

____ ____,
Notary Public.

132 ALBERT M. BARRELL, a witness produced on behalf of the said petitioner, being first duly sworn, deposes and says as follows:

Direct examination by Mr. COLEMAN:

Q. 1. Please state your name, age, residence and occupation.

A. Albert M. Barrell; 33 years old; 4717 Kenwood Avenue.

Q. 2. And your occupation?
A. Nothing doing.
Q. 3. What was your occupation during August, 1908?
A. I was with A. O. Brown & Company in their Railway Exchange office.
Q. 4. How long had you been with them?
A. Ever since they started here in Chicago January 1st, 1907.
Q. 5. How long did you remain in their employ?
A. Until their suspension.
Q. 6. On the 25th of August?
A. The 25th of August, 1908, yes, sir.
Q. 7. Do you know James E. Gorman?
A. Yes sir.
Q. 8. What do you know with reference to a purchase by him of 100 shares of Subway stock about the 24th of August, 1907?
A. Well I remember that Mr. Gorman came in our office down stairs and gave me an order, told me to buy the stock, so I put the order in. Do you want me to tell anything more about it?
Q. 9. Go ahead.
A. Well, I gave it to our operator and he sent it down to New York, and I got a report back and reported to Mr. Gorman.
Q. 10. Your operator in this building?
A. In this building, yes, sir.
133 Q. 11. What was the report?
A. Well, it was just the regular stock report, bought 100 Chicago Subway with the price after it.
Q. 12. Did you tell Mr. Gorman of that?
A. Yes, I reported the execution to him.
Q. 13. Now, just before that purchase, had you sold anything for Mr. Gorman?
A. Yes, he gave me an order to sell some Goldfield Consolidated, I think it was.
Q. 14. How many shares?
A. 300 shares. Because I think—I am not sure of this now, but I know he gave me an order to sell Goldfield and buy Subway stock. Icannot remember so far as the price is concerned.
Q. 15. Then when you received the order or the notice from New York, that it had been purchased then what did you do?
A. Well, I don't remember whether I called Mr. Gorman on the phone and told him, or whether I told him personally in the office, but I notified him about it in either one of those two ways.
Q. 16. Did you communicate with A. O. Brown & Company's office at all with reference to it?
A. No, sir.
Q. 17. You did not?
A. No, sir. I didn't understand the question exactly.
Q. 18. Where did you get this advice from New York that it had been bought, downstairs in the Railway Exchange?
A. Yes, sir.
Q. 19. Then you simply told Mr. Gorman?
A. Yes, sir.

Q. 20. And that was all there was to it? Did you telephone any other office of A. O. Brown, or report it to them?

A. No, sir.

134 Q. 21. That was the end of it?

A. Because they got it themselves, they were on the wire with us. They had instructions to copy all of our executions that went through the office.

Q. 22. That was the office in the Commercial National Bank?

A. They had orders to copy all of our executions in the Railway Exchange.

Q. 23. So that, then, as soon as you had received the wire from New York, the Commercial National Bank office had received the same thing, hadn't they?

A. Well, they should have received it, yes; that was their duty over there to receive those things. I was not there and I don't know.

Q. 24. At that time would A. O. Brown & Company buy Subway on a margin?

A. No, sir; our orders were that it would have to be paid for in full.

Q. 25. Who did those orders come from?

A. The head New York office, the main office in New York.

Q. 26. Then in executing an order to purchase you would require either the cash, would you, or a sufficient credit balance to offset the purchase?

A. The full value of the certificate, yes, sir.

Mr. COLEMAN: That is all, I think.

Cross-examination by Mr. SILBER:

X Q. 1. You never had this certificate in your possession in the Railway Exchange office?

A. Those two you refer to?

X Q. 2. Yes.

A. No, sir.

X Q. 3. It was not the custom to send them here, unless the customer ordered them out, was it?

A. No, it was not.

135 X Q. 4. And as far as your connection with this order is concerned, it is limited to a conversation you had with Mr. Gorman and your direction to your operator to buy the stock?

A. Yes. I don't remember whether I wrote the order out, or whether I told them verbally, but I gave the order to the operator, and it was executed; he gave me the report.

X Q. 5. You got the confirmation?

A. I got confirmation from the operator, yes, sir.

X Q. 6. That is the operator told you verbally?

A. Well, I don't say he told me verbally.

X Q. 7. How did you get it?

A. We had little slips of paper like that, and the operator's duty was to write those out on a little slip, and I would give them to the customer.

X Q. 8. What happened in this case, do you remember?
A. I just told you I don't remember whether it was written or verbal.
X Q. 9. You don't know anything about what the Commercial Bank office did with reference to this order?
A. Not a thing.
X Q. 10. Except from the ordinary course of business?
A. In the course of business they copied our business.

Redirect examination by Mr. COLEMAN:

R. D. Q. 1. Now, this operator to whom you have been referring, where was he located?
A. In our office in the Railway Exchange.
R. D. Q. 2. In the office of A. O. Brown?
A. Yes, sir.
R. D. Q. 3. And was an employé of A. O. Brown?
A. Yes, sir.
136 R. D. Q. 4. And it was your custom, was it, to hand telegrams to him or receive telegrams from him?
A. Yes, sir.
R. D. Q. 5. Was it a private wire?
A. Yes, sir.
R. D. Q. 6. Having connection with what offices?
A. It ran from the Commercial Bank Building office through ours and on through the rest of the offices into Brown's main office in New York.

And further deponent sayeth not.

——— ———.

Subscribed and sworn to before me this 25th day of January, A. D. 1909.

——— ———,
Notary Public.

STATE OF ILLINOIS,
County of Cook, ss:

I, the above F. B. Dickinson, do hereby certify that pursuant to the annexed notice issued and served in the above mentioned cause and the annexed stipulation, in the matter of Albert O. Brown, G. Lee Stout, Edward E. Buchanan, Lewis O. Young, Samuel C. Brown and W. Rhea Whitman, co-partners trading under the name of A. O. Brown & Company, bankrupts, in re petitions of James E. Gorman, petitioner, I was attended at my office by James L. Coleman of counsel for said petitioner, and also by F. D. Silber, of counsel for said bankrupts on the day and date hereinbefore stated; that the aforesaid witnesses, Charles T. Atkinson, Oliver A. Olmstead, Clarence Lasier and Albert M. Barrell, who were of sound mind and lawful age, were by me first carefully examined and cautioned
137 and duly sworn to testify the truth, the whole truth and nothing but the truth, and they thereupon testified as is above

shown, and that the depositions by them subscribed as above set forth were by me reduced to type-writing in the presence of the witnesses themselves, and from their statements and were subscribed by the said witness in my presence, and were taken at the place in the annexed notice specified and at the time set forth; and that all was done, written and signed in the presence of said counsel for said petitioner and said bankrupts.

I further certify that the reason for taking said depositions was and is, and the fact is that all of the deponents live at Chicago, in Cook County, Illinois, in the Northern District of Illinois, Eastern Division, more than one hundred miles from the place where the said suit is appointed by law to be tried, to wit, 980 miles; that I am neither of counsel nor attorney to either of the parties to said suit, nor interested in the event of said cause; and, it being impracticable for me to deliver said depositions and the exhibits thereto attached with my own hand into the court for which they were taken, I have retained the same for the purpose of being sealed up and directed by my own hand and speedily and safely transmitted to the said court for which they were taken, and to remain under my seal until then opened.

Witness my hand and Notarial Seal this twenty-fifth day of January, A. D. 1909.

____ ____,

Notary Public in and for said State of Illinois and County of Cook, in the Northern District of Illinois, Eastern Division.

138 United States District Court, Southern District of New York.

No. 11277.

In the Matter of A. O. Brown & Company, Bankrupts.

Report of Referee as Special Master on Claim of James E. Gorman.

To the Honorable Judge of the District Court of the United States for the Southern District of New York:

I, John J. Townsend, Referee in charge of this case, have before me as Special Master for examination, testimony and report, two petitions of James E. Gorman, filed in the office of the Clerk December 7, 1908, by his attorney, Walker D. Hines. One petition prays for an order against the Receiver, now Trustee, for the delivery of Certificate No. 2,732 for 100 shares of the capital stock of the Chicago Subway Company, and one petition prays for a like order for the delivery of certificates for 250 shares of the capital stock of the Green Cananea Copper Company. The latter stock, it is alleged, was bought and paid for by the claimant April 14, 1908, and the former, it is alleged, was bought and paid for by the claimant August 24, 1908, the day preceding the failure in New York City. The answer of the Receiver, now the Trustee, filed December 8, 1908, in the office of the Clerk, is in substance a general denial.

139 The petition filed December 7, 1908, was returnable November 30, 1908, having been served on the attorneys for the Receiver November 25, 1908. This petition seems to have been preceded by a motion for like relief based on affidavits returnable November 16, 1908, filed on that day in the office of the Clerk, when it was also referred to the Referee in charge as Special Master for examination, testimony and report.

On an affidavit of the attorney for the claimant, filed in the office of the Clerk January 22, 1909, as to the necessity of a deposition to take the testimony of certain witnesses in Chicago, such deposition was so taken, was returned to the Clerk's office in this District January 27, 1909, and was offered in evidence before me April 29, 1909.

The Trustee concedes (p. 76 of the S. M.) that he has in his possession Certificate No. 5732 (erroneously referred to in the moving papers and the testimony as Certificate No. 3732) for 100 shares of Chicago Subway stock actually received by the firm on August 24, 1908, in executing the order of the claimant. The Trustee's counsel, Mr. Wolf, also concedes (p. 55) that the Trustee has in his possession 350 shares of Green Cananea Copper stock endorsed in blank, made up of different certificates.

There is a fair presumption from the testimony of Mr. Ralph Wolf, the counsel for the Trustee, (pp. 53-54) that there are no claims other than that of the claimant against Certificate No. 5732 for 100 shares of Chicago Subway stock or against the 350 shares of Green Cananea Copper stock, at least to the extent of 250 shares of that stock. I shall assume for present purposes that there are no claims other than that of the present claimant, with leave to the Trustee to bring to the attention of the Court on any application for an order on this report, the fact of any other claims of which he may be advised.

140 The testimony taken before me, the ledger account between the claimant and A. O. Brown & Co., which is apparently accepted by all parties as correct, and the accompanying explanatory letter addressed to me by Mr. Ralph Wolf, the counsel for the Trustee, dated November 16, 1909, satisfies me that the facts in this case are in substance as follows:

I do not refer to the testimony taken on deposition in Chicago, because I understand from the brief of the claimant that it is not in any way in conflict with the testimony taken before me, but confirmatory of it.

The claimant for a year or more before the failure of A. O. Brown & Company was a customer dealing with one of the Chicago offices of that firm, both buying stocks on margin and purchasing them paying in full.

On or about April 14, 1908, he directed the Chicago office to buy 250 shares of Green Cananea Copper stock. The stock was bought on the understanding that it was to be paid for in full, this being the condition on which the brokers consented to execute the order. I also find that at the time the order was executed, the claimant had an ample credit balance with the firm applicable on the books to the payment in full for the 250 shares of Green Cananea purchased.

and that such also was the belief of the parties. I also find that the stock was left by the claimant in the possession of the brokers subject to his future order. The testimony of Mr. Wolf (pp. 54-55) satisfies me that the particular certificates delivered to the firm under the purchase made for the account of the claimant, were thereafter delivered in completion of other outstanding contracts of sale of the same stock for other customers of the firm. The testimony of the cashier of the firm, Jackson Waldo Rhoades, satisfies me (p. 69) that certificates of stock purchased for clients which were paid
141 for in full by the clients or purchased on margin, were placed without discrimination in the same tin box, and that it was customary to take certificates to make delivery from that box (p. 71) indiscriminately, unless the certificate had been transferred to the name of the customer.

In this connection, I remind the Court of the admission of the Receiver, now the Trustee, that he has in his possession unendorsed some 250 shares of Green Cananea Copper stock.

The claimant at no time before the failure received his 250 shares of Green Cananea Copper stock, nor did he order its sale. The same is true of the 100 shares of Chicago Subway stock.

Coming to the 100 shares of Chicago Subway stock, I find that it was ordered and purchased through the Chicago office, August 24, 1908, the day before the failure, the purchase being made on the understanding of the parties that the stock was to be paid for in full, and the understanding of the parties being to the effect that the claimant's credit balance was ample for that purpose, as I find it to have been as a matter of fact.

It is a significant feature that at the dates of both the above purchases, the account shows corresponding sales of other securities for the account of the claimant.

The Chicago margin slate produced before me, also indicates that the brokers regarded the two items of securities in their possession as paid for in full by the claimant. I read the testimony of John B. Nevel, the New York margin clerk, to be to the same effect as to these two items of securities (p. 61).

I find that on no account was the claimant at the date of the failure indebted to the firm, and that he was entitled to receive from them at that date the certificate No. 5732 for 100 shares of Chicago Subway stock now in the possession of the Trustee, and 250 shares of Green Cananea Copper stock.

142 I recommend that the claimant be granted an order directing the Trustee to deliver to him the certificate No. 5732 for 100 shares of Chicago Subway stock conceded by all parties to have been bought by the firm on August 24, 1908, for the account of the claimant.

With regard to the Green Cananea Copper stock, it appears affirmatively that the particular certificates delivered to the firm for the account of the claimant at the date of the original purchase, in April, 1908, were delivered to third parties by the firm in completion of outstanding contracts with those parties. At the same time, it appears that the Receiver, now the Trustee, has in his possession cer-

tain certificates endorsed in blank for an aggregate of 350 shares against which prima facie no claim has yet been filed with the Receiver or the Trustee, although I understand the time for filing any such claims has expired. The presumption is that such shares, at least to the extent of 250, were in the possession of the brokers, at the time of their failure, for the account of the claimant. The presumption of right-doing rather than of wrong-doing should be indulged in. Under Richardson vs. Shaw (U. S. Supreme Court), 19 A. B. R., 717, page 724, I regard it as immaterial that the particular certificates delivered to the brokers at the time of the original purchase did not remain in their possession or did not come into the possession of the Receiver, now the Trustee. With this explanation, I recommend an order against the Trustee for the delivery out of the shares now in his possession, certificates to the extent of 250 shares, and that he be authorized to make any endorsement or transfer of the certificates in his possession necessary to carry out the order.

With respect to both stocks, the order should provide that the Trustee should pay to the claimant any dividends that the
143 Receiver or he may have received thereon.

New York November 22, 1909.

J. J. TOWNSEND,
Referee in Bankruptcy, Acting as Special Master.

(Endorsed:) Referee's Report.—Filed Dec. 3, 1909.

United States District Court, Southern District of New York.

In Bankruptcy.

In the Matter of ALBERT O. BROWN, G. LEE STOUT, EDWARD F. Buchanan, Lewis G. Young, Samuel C. Brown and W. Rhea Whitman, Co-partners Trading under the Name of A. O. Brown & Company, Bankrupts.

SIRS: Please take notice that upon the report of the Referee as Special Master on the claim of James E. Gorman to reclaim 100 shares of the capital stock of the Chicago Subway Company represented by stock certificate No. 5732 and 250 shares of the capital stock of the Green Cananea Copper Company, from Charles E. Littlefield, the trustee of the estate of the above-named bankrupts, which report was filed this day in the office of the Clerk of the District Court of the United States for the Southern District
144 of New York, and a copy of which is annexed hereto and marked Exhibit "A," and upon all records and proceedings herein I shall move this Court at a Stated Term thereof to be held in the United States Post Office Building in the Borough of Manhattan, City of New York, on the 6th day of December, 1909, at 10:30 o'clock in the forenoon or as soon thereafter as Counsel can be heard for an order confirming the above mentioned report of the Referee and as Special Master herein, and further directing Charles E. Littlefield, the trustee of the estate of the above-named bankrupts,

to return and deliver to said James E. Gorman or his duly authorized attorney in fact the certificate No. 5732 for 100 shares Chicago Subway stock, together with any dividends upon such stock which the said trustee may have received, and certificates representing 250 shares of the capital stock of the Green Cananea Copper Company, together with any evidence upon such stock as he may have received and further directing that said trustee shall pay to said petitioner, James E. Gorman, costs and disbursements herein; and for such other and further relief as to the Court may seem just.

Dated, New York, December 2, 1909.

Yours, &c.,

WALKER D. HINES,
Solicitor for James E. Gorman.

Office & P. O. Address, 52 William Street, Borough of Manhattan, New York City, N. Y.

To Messrs. Hayes, Hirschfield & Wolf, Counsel for Trustee, 115 Broadway, New York City.

(Endorsed:) Notice of motion to confirm Referee's report filed Dec. 3d, 1909.

(*Mem. Endorsed on Notice of Motion.*)

MEM.—Over. C. M. H.

It is useless to do more than refer to the McIntyre case. Claimant can get only.

1st. What is his &

2nd. in Trustee's possession. Similarity of kind does not prove specific property. Report set aside except as to Chicago Subway stock. No costs.

12/28/09.

C. M. H., *J.*

145 At a Stated Term of the District Court of the United States for the Southern District of New York, held in the General Post Office Building, in the Borough of Manhattan, City of New York, on the 15th day of January, 1910.

Present: Hon. Charles M. Hough, District Judge.

In the Matter of A. O. BROWN & Co., Bankrupts; Ex Parte JAMES E. GORMAN.

A motion having been made herein to confirm the report of the Referee as Special Master herein, dated November 22, 1909; on reading and filing the notice of motion herein, the report of the Referee as Special Master, and after hearing Jarvis P. Carter, Esq., of counsel for the petitioner, in support of said motion, and Ralph Wolf, of counsel for the Trustee, in opposition thereto.

On motion of Hays, Hershfield & Wolf, attorneys for the Trustee, it is

Ordered that said motion be and the same hereby is in all respects denied, except as hereinafter ordered, and the said report be and the same hereby is set aside, and the claim of the petitioner herein dismissed, except as hereinafter ordered.

146 And it is further ordered that in so far as said report recommends the delivery to the petitioner herein of Certificate No. 5732 for one hundred shares of Chicago Subway stock, same be and hereby is confirmed, and the Trustee be and he hereby is directed to deliver said certificate for one hundred shares of Chicago Subway stock, together with any dividends received thereon by the estate herein.

And it is further ordered that this order shall be without prejudice to the right of the petitioner to file a claim as a general creditor of the estate herein within thirty days from the entry hereof, and that neither party hereto shall recover costs or disbursements against the other.

C. M. HOUGH, *D. J.*

(Endorsed:) Order modifying report of Referee filed January 15, 1910.

147 District Court of the United States for the Southern District of New York.

In the Matter of ALBERT O. BROWN, G. LEE STOUT, EDWARD F. Buchanan, Lewis G. Young, Samuel C. Brown and W. Rhea Whitman, Co-partners, Trading under the Name of A. O. Brown & Company, Bankrupts; James E. Gorman, Intervening Petitioner.

Assignment of Errors on Appeal.

And now on this seventeenth day of June, A. D. 1910, comes James E. Gorman, by Thorndike Saunders, Robert Dunlap and James L. Coleman, his solicitors, and alleges and says that the order, judgment and decree as to 250 shares of capital stock of the Green-Cananea Copper Company rendered in respect to the intervening petition of said James E. Gorman, filed in said proceedings, is erroneous and against the rights of said petitioner, for the following reasons, to wit:

1. The District Court of the United States for the Southern District of New York erred in holding that under the evidence the said petitioner, James E. Gorman, was not entitled to have delivered to him by the Trustee in Bankruptcy of said A. O. Brown & Company 250 shares of capital stock of the Green Cannanea Copper, out of the 350 unclaimed shares of said stock now in the possession of said Trustee.

148 2. That the said District Court erred in holding that under the evidence said petitioner, James E. Gorman, did not have an equitable right to 250 shares of capital stock of the Green

Cannanea Copper Company, out of the 350 unclaimed shares of s
stock now in the possession of said Trustee.

3. That the said District Court erred in not ordering the Tru
in Bankruptcy to turn over to said petitioner, James E. Gorm
250 shares of capital stock of the Green Cannanea Copper Compa
out of the 350 unclaimed shares of said stock now in possessio
said Trustee.

4. That the said District Court erred in adopting and not sett
aside the following erroneous finding of fact of John J. Townse
Referee and Special Master in said cause, in words and figures as
lows, to wit:

"With regard to the Green Cannanea Copper stock, it appe
affirmatively that the particular certificates delivered to the firm
the account of the claimant at the date of the original purchase
April, 1908, were delivered to third parties by the firm in complet
of outstanding contracts with those parties."

5. That the Referee and Special Master in said cause, John
Townsend, erred in making the following erroneous finding of f
in words and figures as follows, to wit:

"With regard to the Green Cannanea Copper Stock, it appe
affirmatively that the particular certificates delivered to the f
for the account of the claimant at the date of the original purch
in April, 1908, were delivered to third parties by the firm in c
pletion of outstanding contracts with those parties."

149 6. That the said District Court erred in holding un
the findings of fact contained in the report of said Jo
J. Townsend, Referee and Special Master in said cause, that s
petitioner, James E. Gorman, did not have an equitable right in
was not entitled to have delivered to him by said Trustee in Ba
ruptcy 250 shares of capital stock of the Green Cannanea Cop
Company, out of the 350 unclaimed shares of said stock now in
possession of said Trustee.

7. That the said District Court erred in reversing, setting aside
not approving in full the conclusions of law and recommendati
of John J. Townsend, Referee and Special Master in said cause,
the effect that said petitioner, James E. Gorman, was and is entit
to the relief prayed for in his said petition herein as to the
shares of capital stock of Green Cannanea Copper Company,
of the 350 unclaimed shares of said stock now in possession of s
Trustee.

8. That said District Court erred in refusing to approve and
reversing and setting aside the recommendations of John
Townsend, Referee and Special Master in said cause, as to the
shares of capital stock of the Green Cannanea Copper Company,
the words and figures as follows, to-wit:

"I recommend an order against the Trustee for the delivery
of the shares now in his possession, certificates to the extent of
shares, and that he be authorized to make any endorsement or tra
fer of the certificates in his possession necessary to carry out
order,"

and in refusing to enter an order in accordance with said recommendation.

150 9. That the said District Court erred in entering an order and decree in said cause to the effect that said petitioner, James E. Gorman, was not entitled to have delivered to him 250 shares of the capital stock of the Green Cannanea Copper Company, as prayed for in his said petition; and in refusing to enter an order and decree in said cause that said Trustee deliver to said James E. Gorman 250 shares of capital stock of the Green Cannanea Copper Company, out of the 350 unclaimed shares of said stock now in possession of said Trustee.

Wherefore, said petitioner, James E. Gorman, prays that the said order, findings and decree as to 250 shares of capital stock of the Green Cannanea Copper Company be reversed, and that said District Court may be directed to enter a decree against the said Trustee in Bankruptcy of Albert O. Brown, G. Lee Stout, Edward F. Buchanan, Lewis G. Young, Samuel C. Brown and W. Rhea Whitman, Co-Partners, trading under the name of A. O. Brown & Company, Bankrupts, and in favor of James E. Gorman, as to 250 shares of capital stock of the Green Cannanea Copper Company.

THORNDIKE SAUNDERS,
ROBERT DUNLAP,
JAMES L. COLEMAN,
Solicitors for said Intervening Petitioner,
James E. Gorman.

(Endorsed:) Assignment of Errors. Filed June 20, 1910.

151 . District Court of the United States for the Southern District of New York.

In the Matter of ALBERT O. BROWN, G. LEE STOUT, EDWARD F. Buchanan, Lewis G. Young, Samuel C. Brown and W. Rhea Whitman, Co-partners, Trading under the Name of A. O. Brown & Company, Bankrupts; James E. Gorman, Intervening Petitioner.

The above named intervening petitioner, James E. Gorman, conceiving himself aggrieved by the decree rendered against him on the fifteenth day of January, 1910, in favor of Charles E. Littlefield, Trustee in Bankruptcy of Albert O. Brown, G. Lee Stout, Edward F. Buchanan, Lewis G. Young, Samuel C. Brown and W. Rhea Whitman, Co-Partners, trading under the name of A. O. Brown & Company, Bankrupts, on the intervening petition of said James E. Gorman filed in the above entitled proceedings and matter, to reclaim 250 shares of capital stock of the Green Cannanea Copper Company, does hereby appeal from said order, judgment, ruling and decree of the District Court of the United States for the Southern District of New York to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the Assignment of Errors which is filed herewith; and the said intervening petitioner,

James E. Gorman, prays that this appeal may be allowed and that a transcript of the record, proceedings and papers in which
152 said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated at New York, this seventeenth day of June, 1910.

THORNDIKE SAUNDERS,
ROBERT DUNLAP,
JAMES L. COLEMAN,
Solicitors for Intervening Petitioner and Appellant, James E. Gorman.

No. 27 William Street, Door 314, New York City.

Now, to wit, on the 17th day of June, 1910, it is ordered that the appeal be allowed as above prayed for.

C. M. HOUGH,
District Judge.

(Endorsed:) Petition and Order Allowing Appeal. Filed June 20, 1910.

153 American Surety Company of New York.

Capital and Surplus $5,500,000.

Company's Office Building, 100 Broadway, New York.

District Court of the United States for the Southern District of New York.

In the Matter of ALBERT O. BROWN, G. LEE STOUT, EDWARD F. BUCHANAN, Lewis G. Young, Samuel C. Brown and W. Rhea Whitman, Co-partners, Trading under the Name of A. O. Brown & Company, Bankrupts; James E. Gorman, Intervening Petitioner.

Bond.

Know all men by these presents, That we, James E. Gorman, of the City of Chicago, County of Cook and State of Illinois, as Principal and American Surety Company of New York, of the City of New York, State of New York, as Surety, are held and firmly bound unto Charles E. Littlefield, Trustee in Bankruptcy of Albert O. Brown, G. Lee Stout, Edward F. Buchanan, Lewis G. Young, Samuel C. Brown and W. Rhea Whitman, co-partners, trading under the name of A. O. Brown & Company, bankrupts, in the sum of Two Hundred and Fifty Dollars ($250), to be paid to said Trustee as his interest may appear, to which payment well and truly to be made, we bind ourselves, jointly and severally,
154 and each of our assigns, jointly, by these presents.

Dated, this 17th day of June, 1910.

Whereas, the above-named intervening petitioner, James E. Gorman, has prosecuted his appeal to the United States Circuit Court of Appeals for the Second Circuit to reverse the final order, judgment and decree rendered in the above entitled matter and proceeding against said James E. Gorman and in favor of Charles E. Littlefield, Trustee in Bankruptcy of Albert O. Brown, G. Lee Stout, Edward F. Buchanan, Lewis G. Young, Samuel C. Brown and W. Rhea Whitman, co-partners, trading under the name of A. O. Brown & Company, bankrupts, by the District Court of the United States for the Southern District of New York, as to 250 shares of capital stock of the Green Cananea Copper Company.

Now, therefore, the condition of this obligation is, That if the above-named James E. Gorman shall prosecute his appeal to effect, and pay all costs and damages that may be adjudged and awarded against him if he shall fail to make his appeal good then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JAMES E. GORMAN,
[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK,
By HORACE P. HOLLISTER,
Resident Vice-President.

Attest:

MARSHALL L. BROWER,
Resident Assistant Secretary.

Taken and approved by me this 17 day of June, 1910.

C. M. HOUGH,
District Judge.

155 STATE OF NEW YORK,
County of New York, ss:

On this 17th day of June, 1910, before me personally appeared Horace P. Hollister, Resident Vice-President of the American Surety Company of New York, to me known, who, being by me duly sworn, did depose and say: that he resides in Mt. Vernon, N. Y.; that he is the Resident Vice-President of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knows the corporate seal of said Corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said Corporation; that he signed his name thereto by like order; and that the liabilities of said Corporation do not exceed its assets as ascertained in the manner provided by law. And the said Horace P. Hollister, further said that he is acquainted with Marshall L. Brower, and knows him to be one of the Resident Assistant Secretaries of said Corporation; that the signature of said Marshall L. Brower, subscribed to the said instrument is in the genuine handwriting of the said Marshall L. Brower, and was thereto subscribed by the like

order of the said Board of Trustees, and in the presence of him the said Horace P. Hollister, Resident Vice-President.

[L. S.] E. A. FARRELL,
Notary Public, New York County.

Certificate filed in all counties.

[Endorsed:] Bond on Appeal. Filed June 20, 1910.

156 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Charles E. Littlefield, Trustee in Bankruptcy of Albert O. Brown, G. Lee Stout, Edward F. Buchanan, Lewis G. Young, Samuel C. Brown, and W. Rhea Whitman, Co-partners, trading under the name of A. O. Brown & Company, Bankrupts, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Second Circuit, to be holden at New York City, within thirty days from the date hereof, pursuant to an appeal filed in the office of the Clerk of the District Court of the United States for the Southern District of New York, wherein James E. Gorman is appellant and you are appellee, to show cause, if any there be, why the judgment, order and decree rendered against the said appellant as in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable C. M. Hough, Judge of the District Court of the United States for the Southern District of New York this 17th day of June, in the year of our Lord one thousand nine hundred and ten.

C. M. HOUGH,
Judge of the District Court of the United States for the Southern District of New York.

Received a copy of the within and foregoing citation this 20 day of June, A. D. 1910.

HAYS, HERSHFIELD & WOLF,
Solicitors for Charles E. Littlefield, Trustee, Appellee.

(Endorsed:) Citation. Filed June 20, 1910.

157 UNITED STATES OF AMERICA,
Southern District of New York, ss:

In the Matter of ALBERT O. BROWN et al., Bankrupts, in re Reclamation of JAMES E. GORMAN, Owner of Certain Securities, &c.

Appeal from Order of District Court, Dated January 15, 1910.

JAMES E. GORMAN, Reclaimant-Appellant.

I, Thomas Alexander, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the District Court in the above-entitled matter.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 11th day of August, in the year of our Lord one thousand nine hundred and ten, and of the Independence of the said United States the one hundred and thirty-fifth.

[SEAL.] THOS. ALEXANDER, *Clerk.*

158 United States Circuit Court of Appeals.

In the Matter of ALBERT O. BROWN et al., Bankrupts; JAMES E. GORMAN, Appellant.

SIRS: Please Take Notice that upon the annexed affidavit of Ralph Wolf, sworn to September 30, 1910; upon the report of the Referee herein as Special Master, filed herein on December 3, 1909; upon the order herein of the United States District Court for the Southern District of New York, filed herein on the 15th day of January, 1910, modifying the said report of the Referee as Special Master herein; upon the appeal by the reclaimant, James E. Gorman, taken herein on the 20th day of June, 1910; upon all the proceedings had herein, and upon a transcript of the record of the proceedings herein, the undersigned will move this Court, on the 10th day of October, 1910, at 10:30 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for an order dismissing the petition for review and the appeal taken herein, upon the ground that the same were not taken within the time required by law, and for such other and further relief as to the Court may seem just and proper.

Dated, New York, September 30, 1910.

HAYS, HERSHFIELD & WOLF,
Attorneys for Trustee-Appellee.

Office and Post Office Address, No. 115 Broadway, Borough of Manhattan, New York City.

To Thorndike Saunders, Robert Dunlap, and James L. Coleman, Esqs., Solicitors for Reclaimant-Appellant.

159 United States Circuit Court of Appeals.

In the Matter of ALBERT O. BROWN et al., Bankrupts; JAMES E. GORMAN, Appellant.

STATE OF NEW YORK,
Southern District of New York, ss:

Ralph Wolf, being duly sworn, deposes and says: That he is a member of the firm of Hays, Hershfield & Wolf, the solicitors for the Trustee-Appellee herein.

That on the 7th day of December, 1908, two petitions of the appellant, James E. Gorman, praying for an order against the Receiver (now the Trustee herein) for the delivery of certain certificates representing shares of the capital stock of the Chicago Subway Company and Green Cananea Copper Company, respectively, were filed in the office of the Clerk of the United States District Court for the Southern District of New York.

That Honorable John J. Townsend, the Referee in charge of this matter, was appointed by the Court as Special Master herein, for examination, testimony and report, and as such, filed a report herein on the 3rd day of December, 1909, recommending that the claimant be granted an order directing the Trustee to deliver to him the certain stock certificates hereinbefore referred to.

160 A motion having been made herein to confirm the report of the Referee as Special Master herein, and said motion having come on to be heard at a Stated Term of the United States District Court for the Southern District of New York, it was ordered that the motion to confirm said report be and the same was denied, except insofar as the said report recommended the delivery to the petitioner of the certificates representing the shares of stock of the Chicago Subway Company, and in this respect alone, was confirmed, and the Trustee was directed to deliver said certificate to the reclaimant, together with the dividends thereon. Said order was dated the 15th day of January, 1910, and filed in the office of the Clerk of the United States District Court for the Southern District of New York, on said day.

That since the granting and filing of said order, no extension of time was granted by counsel for the Trustee, by stipulation entered into, and, on information and belief, no order of Court has been granted herein extending the time of the reclaimant to appeal from said order beyond the ten days provided for by Section 25 of the Bankruptcy Act.

That the reclaimant James E. Gorman pretended to take an appeal herein on the 20th day of June, 1910, and on said day the assignment of errors herein was filed.

Your deponent contends that said appeal, if properly taken pursuant to the provisions of Section 25 of the Bankruptcy Act, must be taken within ten days from the date of the order appealed

161 from.

Your deponent further contends that no appeal under

Section 25 herein will lie, but that the remedy of claimant is by petition to review under Section 24 of the Bankruptcy Act. That no extension of time has been granted by counsel for the Trustee by stipulation entered into, nor has any order of Court been granted herein extending the time of the reclaimant to file or serve petition to review said order, and the time to do so has long since expired.

Your deponent therefore prays that the appeal attempted to have been filed herein be dismissed, for the reasons: First, that if an appeal lie from the order from which an appeal is attempted to be taken, that the ten days within which same may have been done under Section 25 of the Bankruptcy Act has expired long prior to the taking of such appeal, and Secondly, no such appeal will lie, but the sole remedy is by petition to review, the time to file which has long since expired.

Your deponent therefore respectfully prays that an order be granted herein dismissing said attempted appeal of James E. Gorman herein, with costs.

RALPH WOLFE.

Sworn to before me this 30th day of September, 1910.

ELI M. COHEN,
Notary Public, N. Y. Co.

162 Endorsed: United States Circuit Court of Appeals. In the matter of Albert O. Brown et al., Bankrupts, James E. Gorman, Appellant. Affidavit and Notice of Motion. Hays, Hershfield & Wolf, Attorneys for Trustee-Appellee, No. 115 Broadway (United States Realty Building) Borough of Manhattan, New York City. Due service of a copy of the within Affi'd't & notice of motion is hereby admitted. Dated New York, Oct. 15, 1910. Thorndike Sounders, Robert Dunlap, James L. Coleman, Att'y for Appellant, 27 William St. United States Circuit Court of Appeals, Second Circuit. Filed Oct. 10, 1910. William Parkin, Clerk.

163 United States Circuit Court of Appeals, Second Circuit.

Matter of
BROWN, GORMAN
vs.
LITTLEFIELD.

Motion to dismiss appeal denied.

Endorsed: United States Circuit Court of Appeals Second Circuit. Filed Oct. 10, 1910. William Parkin, Clerk.

164 At a stated term of the United States Circuit Court of Appeals for the Second Circuit, held at the court rooms in the Post Office Building, City of New York, on the 20th day of October, 1910.

Present:

Hon. E. Henry Lacombe,
Hon. Alfred C. Coxe,
Hon. Henry G. Ward,
Circuit Judges.

In the Matter of ALBERT O. BROWN et al., Bankrupts; JAMES E. GORMAN, Appellant.

A motion having been made by counsel for the appellee to dismiss the appeal herein;

Upon consideration thereof it is

Ordered that the said motion be and hereby is denied.

E. H. L.

Endorsed: United States Circuit Court of Appeals Second Circuit. In re A. O. Brown et al. Jas. E. Gorman. Order. United States Circuit Court of Appeals Second Circuit. Filed Oct. 20, 1910. William Parkin Clerk.

165 United States Circuit Court of Appeals for the Second Circuit, October Term, 1910.

Argued December 16, 1910. Decided January 9, 1911.

No. 125.

In the Matter of ALBERT O. BROWN et al., Bankrupts; JAMES E. GORMAN, Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

Before Lacombe, Coxe and Noyes, Circuit Judges.

This is an appeal from an order of the District Court, Southern District of New York, setting aside the report of the Referee and Special Master, and dismissing petitioner's application to have 250 shares of Greene Cananea Copper Company stock delivered to him. The bankrupt bought 250 shares of such stock for him, on April 14, 1908, in odd lots from various sellers and received ceretificates therefor. Gorman paid for the stock, but allowed the certificates to remain with bankrupts without being transferred to his name. Without his knowledge bankrupts by May 14th, 1908, had taken all this stock and delivered it out in execution of contracts of their own

with other parties. From that time down to their failure
166 (August 24th) it does not appear what transactions they had in Greene Cananea stock. Upon their bankruptcy there was found in their safe 350 shares of the stock of that company made up of different certificates. Petitioner claims that he is entitled to 250 shares thereof.

Per *Curiam:*

The precise point raised here was before us in re McIntyre, Petitions of Grace, Talbot and others (opinion filed August 11, 1910). The Special Master's report on the Talbot claim will be found in 24 A. B. R., 20. Upon the appeal before us, attention was called to the circumstance that there was a division of opinion in the District Court, Judge Hand having decided one way in re A. O. Brown & Co., 171 F. R., 254, and Judge Hough the other way in the case then before us. Counsel for Talbot presented an exhaustive brief of thirty-four pages, citing substantially all the authorities to which we are now referred, and supporting his appeal by the same line of reasoning. We sustained Judge Hough, and see no reason for re-opening the question settled by that decision.

The order is affirmed with costs.

Thorndike Saunders, for the Appellant.
Ralph Wolf, for the Appellee.

167 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 19th day of January, one thousand nine hundred and eleven.

Present:

Hon. E. Henry Lacombe,
Hon. Alfred C. Coxe,
Hon. Walter C. Noyes,
Circuit Judges.

In the Matter of ALBERT O. BROWN et al., Bankrupts; JAMES E. GORMAN, Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

E. H. L.

168 Endorsed: United States Circuit Court of Appeals Second Circuit. In re A. O. Brown et al. Order for Mandate. United States Circuit Court of Appeals Second Circuit. Filed Jan. 19, 1911. William Parkin, Clerk.

169 In the United States Circuit Court of Appeals for the Second Circuit.

In the Matter of Albert O. Brown et al., Bankrupts.

No. 125.

JAMES E. GORMAN (Intervening Petitioner), Appellant,

v.

CHARLES E. LITTLEFIELD, Trustee in Bankruptcy of Albert O. Brown, G. Lee Stout, Edward F. Buchanan, Lewis G. Young, Samuel C. Brown, and W. Rhea Whitman, Co-partners, Trading under the Name of A. O. Brown & Company, Bankrupts, Appellee.

Petition on Appeal.

The above named appellant, James E. Gorman, (intervening petitioner), conceiving himself aggrieved by the order and decree made and rendered against him on the 19th day of January, 1911, in favor of appellee, Charles E. Littlefield, Trustee in Bankruptcy of Albert O. Brown, G. Lee Stout, Edward F. Buchanan, Lewis G. Young, Samuel C. Brown and W. Rhea Whitman, Co-partners, trading under the name of A. O. Brown & Company, Bankrupts, on the Intervening Petition and Appeal of said James E. Gorman, filed in the above entitled cause, to reclaim two hundred and fifty shares of capital stock of the Green Cananea Copper Company of the value of $2,783.38, does hereby appeal from said order and decree of the United States Circuit Court of Appeals for the Second Circuit to the United States Supreme Court, for the reasons specified in the Assignment of Errors which is filed herewith; and the said appellant, James E. Gorman, (intervening petitioner), prays that this appeal may be allowed and that a transcript of the record,
170 proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the United States Supreme Court.

Dated at New York this 20th day of Feb., 1911.

THORNDIKE SAUNDERS,
ROBERT DUNLAP, &
J. L. COLEMAN,
Solicitors for Appellant, (Intervening Petitioner), James E. Gorman.

No. 27 William Street, Door 314, New York City.
Room 1011, Railway Exchange, Chicago, Illinois.

Now, on to-wit, the 20th day of February, 1911, it is ordered that the appeal be allowed as above prayed for, conditioned upon the filing and approval of a bond in the sum of Five Hundred Dollars.

ALFRED C. COXE,
Judge of the United States Circuit Court of Appeals for the Second Circuit.

171 (Endorsed:) Matter of Brown. Petition. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 20, 1911. William Parkin, Clerk.

172 In the United States Circuit Court of Appeals for the Second Circuit.

In the Matter of ALBERT O. BROWN et al., Bankrupts

No. 125.

JAMES E. GORMAN (Intervening Petitioner), Appellant,
v.
CHARLES E. LITTLEFIELD, Trustee in Bankruptcy of Albert O. Brown, G. Lee Stout, Edward F. Buchanan, Lewis G. Young, Samuel C. Brown, and W. Rhea Whitman, Co-partners, Trading under the Name of A. O. Brown & Company, Appellee.

Now comes the appellant herein and presents a bond upon his appeal to the Supreme Court of the United States in the penal sum of Five Hundred Dollars.

Thereupon it is ordered that said bond be and it is hereby approved; and it is further ordered by the court that all further proceedings in this court be and they are hereby suspended and stayed until the determination of said appeal by the United States Supreme Court.

Dated February 20th, 1911.

ALFRED C. COXE,
Judge of the United States Circuit Court of Appeals for the Second Circuit.

173 (Endorsed:) Matter of Brown Order. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 20, 1911. William Parkin, Clerk.

174 In the United States Circuit Court of Appeals for the Second Circuit.

In the Matter of ALBERT O. BROWN et al., Bankrupts.

No. 125.

JAMES E. GORMAN (Intervening Petitioner), Appellant,
v.
CHARLES E. LITTLEFIELD, Trustee in Bankruptcy of Albert O. Brown, G. Lee Stout, Edward F. Buchanan, Lewis G. Young, Samuel C. Brown, and W. Rhea Whitman, Co-partners, Trading under the Name of A. O. Brown & Company, Bankrupts, Appellee.

Bond.

Know all men by these presents, That we, James E. Gorman, of the City of Chicago, County of Cook and State of Illinois, as principal, and American Surety Company of New York, of the City of New York, State of New York, as surety, are held and firmly bound unto the appellee, Charles E. Littlefield, Trustee in Bankruptcy of Albert O. Brown, G. Lee Stout, Edward F. Buchanan, Lewis G. Young, Samuel C. Brown and W. Rhea Whitman, Co-partners, trading under the name of A. C. Brown & Company, Bankrupts, in the sum of Five Hundred Dollars ($500.00) to be paid to said Appellee as his interest may appear, to which payment well and truly to be made, we bind ourselves, jointly and severally, and each of our assigns, jointly, by these presents.

Dated this 20th day of February, 1911.

Whereas, lately to-wit, on the 19th day of January, 1911, at the United States Circuit Court of Appeals for the Second Circuit in a cause pending in the said court between James E. Gorman, (intervening petitioner), Appellant, and Charles E. Littlefield, as
175 Trustee in Bankruptcy of Albert O. Brown, G. Lee Stout, Edward F. Buchanan, Lewis G. Young, Samuel C. Brown and W. Rhea Whitman, Co-partners, trading under the name of A. O. Brown & Company, Bankrupts, Appellees, an order and decree was rendered against the said James E. Gorman, affirming an order and decree of the District Court of the United States for the Southern District of New York against said James E. Gorman, (intervening petitioner), Appellant, and in favor of said Appellee, as to 250 shares of the capital stock of the Greene Cananea Copper Company; and

Whereas the Appellant, James E. Gorman, (intervening petitioner), having been granted an appeal from said order and decree of the United States Circuit Court of Appeals for the Second Circuit in the aforesaid cause to the United States Supreme Court; and having obtained a citation directed to the said Charles E. Littlefield, Trustee, Appellee, citing and admonishing him to be and appear in

the United States Supreme Court at the City of Washington, District of Columbia, within the time limited within said citation:

Now, the condition of the above obligation is such, That if the said Appellant, James E. Gorman, (intervening petitioner), shall prosecute his said appeal to effect and shall answer all damages and costs if he fails to make his plea good and to secure a reversal of the order and decree of the United States Circuit Court of Appeals for the Second Circuit in said cause, then the above obligation to be void, otherwise to remain in full force and virtue.

It witness whereof the said obligors have hereunto set their hands and seals.

JAMES E. GORMAN. [SEAL.]
AMERICAN SURETY COMPANY OF NEW YORK,
By HORACE P. HOLLISTER,
Resident Vice-President.

Attest:

JARED F. HARRISON,
Resident Assistant Secretary.

176 STATE OF NEW YORK,
County of New York, ss:

On this 20th day of February, 1911, before me personally appeared Horace P. Hollister, Resident Vice President of the American Surety Company of New York, to me known, who, being by me duly sworn, did depose and say; that he resides in Mt. Vernon, N. Y., that he is the Resident Vice President of the American Surety Company of New York, the Corporation described in and which executed the above instrument; that he knows the corporate seal of said Corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said Corporation; and that he signed his name thereto by like order; and that the liabilities of said Corporation do not exceed its assets as ascertained in the manner provided by law. And the said Horace P. Hollister, further said that he is acquainted with Jared F. Harrison and knows him to be one of the Resident Assistant Secretaries of said Corporation; that the signature of said Jared F. Harrison subscribed to the said instrument is in the genuine handwriting of the said Jared F. Harrison and was thereto subscribed by the like order of the said Board of Trustees, and in the presence of him the said Horace P. Hollister, Resident Vice President.

[L. S.] E. A. FARRELL,
Notary Public, New York County.

Certificate filed in all counties.

177 (Endorsed:) Matter of Brown. Bond. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 20, 1911. William Parkin, Clerk.

178 In the United States Circuit Court of Appeals for the Second Circuit.

In the Matter of ALBERT O. BROWN et al., Bankrupts.

No. 125.

JAMES E. GORMAN (Intervening Petitioner), Appellant,
v.
CHARLES E. LITTLEFIELD, Trustee of ALBERT O. BROWN, G. LEE Stout, Edward F. Buchanan, Lewis G. Young, Samuel C. Brown and W. Rhea Whitman, Co-partners, trading under the name of A. O. Brown & Company, Bankrupts, Appellee.

Assignment of Errors on Appeal.

And now on this 20th day of Febry., A. D. 1911, comes James E. Gorman, by Thorndike Sounders, Robert Dunlap and James L. Coleman, his solicitors, and alleges and says that the order and decree of the United States Circuit Court of Appeals for the Second Circuit, as to Two Hundred and Fifty (25-) shares of capital stock of the Green Cananea Copper Company, rendered in respect to the intervening petition of said James E. Gorman, Appellant, filed in said cause, is erroneous and against the rights of the appellant, for the following reasons, to-wit:

1. Said court erred in holding that under the evidence the said Appellant, James E. Gorman, was not entitled to have delivered to him by the Trustee in Bankruptcy of said A. O. Brown & Company 250 shares of capital stock of the Green Cananea Copper Company, out of the 350 unclaimed shares of said stock now in the possession of said Trustee.

179 2. Said Court erred in holding that under the evidence said appellant, James E. Gorman, did not have an equitable right to 250 shares of capital stock of the Green Cananea Copper Company, out of the 350 unclaimed shares of said stock now in the possession of said Trustee.

3. Said Court erred in not ordering the Trustee in Bankruptcy to turn over to said appellant, James E. Gorman, 250 shares of capital stock of the Green Cananea Copper Company, out of the 350 unclaimed shares of said stock now in possession of said Trustee.

4. Said Court erred in holding under the findings of fact contained in the report of said John J. Townsend, Referee and Special Master in said cause, that said appellant, James E. Gorman, did not have an equitable right in and was not entitled to have delivered to him by said Trustee in Bankruptcy 250 shares of capital stock of the Green Cananea Copper Company, out of the 350 unclaimed shares of said stock now in the possession of said Trustee.

5. Said court erred in reversing, setting aside and not approving in full the conclusions of law and recommendations of John J. Townsend, Referee and Special Master in said cause, to the effect

that said appellant, James E. Gorman, was and is entitled to the relief prayed for in his said petition herein as to the 250 shares of capital stock of the Green Cananea Copper Company, out of the 350 unclaimed shares of said stock now in possession of said Trustee.

6. Said court erred in refusing to approve and in reversing and setting aside the recommendations of John J. Townsend, Referee and Special Master in said cause, as to the 250 shares of capital stock of the Green Cananea Copper Company, in the words and figures as follows, to-wit:

"I recommend an order against the Trustee for the delivery out of the shares now in his possession, certificates to the extent of
180 250 shares, and that he be authorized to make any endorsement or transfer of the certificates in his possession necessary to carry out the order,"

and in refusing to enter an order in accordance with said recommendation.

7. Said Court erred in entering an order and decree in said cause to the effect that said appellant, James E. Gorman, was not entitled to have delivered to him 250 shares of the capital stock of the Green Cananea Copper Company, as prayed for in his said petition; and in refusing to enter an order and decree in said cause that said Trustee deliver to said James E. Gorman 250 shares of capital stock of the Green Cananea Copper Company out of the 350 unclaimed shares of said stock now in possession of said Trustee.

8. Said court erred in affirming the order and decree of the District Court of the United States for the Southern District of New York in favor of appellee, when it should have reversed the order and decree of said court according to the law of the land.

Wherefore said appellant, James E. Gorman, prays that the said order and decree of the United States Circuit Court of Appeals for the Second Circuit, as to 250 shares of capital stock of the Green Cananea Copper Company, affirming the order and decree of the District Court of the United States for the Southern District of New York, be reversed, and that said court may be directed to enter an order and decree reversing the order and decree of said District Court of the United States for the Southern District of New York and that said court may be directed to enter an order and decree against said appellee, Charles E. Littlefield, Trustee in Bankruptcy of Albert O. Brown, G. Lee Stout, Edward F. Buchanan, Lewis G. Young, Samuel C. Brown and W. Rhea Whitman, Co-Partners, trading under the name of A. O. Brown & Company, Bankrupts, and in favor of
181 James E. Gorman, Appellant, as to 250 shares of capital stock of the Green Cananea Copper Company, as prayed for in his Intervening Petition.

THORNDIKE SAUNDERS,
ROBERT DUNLAP,
JAMES L. COLEMAN,
Solicitors for Appellant, James E. Gorman.

182 (Endorsed:) Matter of Brown. Assignment of Errors. Presented February 20, 1911. Alfred C. Coxe, U. S. Cir. Judge. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 20, 1911. William Parkin, Clerk.

183 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 182 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the Matter of A. O. Brown et al. (James E. Gorman), as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed at the City of New York, in the Southern District of New York, in the Second Circuit, this 23d day of February, in the year of our Lord One Thousand Nine Hundred and Eleven and of the Independence of the said United States the One Hundred and Thirty-fifth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

184 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to Charles E. Littlefield, Trustee in Bankruptcy of Albert O. Brown, G. Lee Stout, Edward F. Buchanan, Lewis G. Young, Samuel C. Brown and W. Rhea Whitman, Co-Partners, trading under the name of A. O. Brown & Company, Bankrupts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, District of Columbia, within thirty days from and after this citation bears date, pursuant to an appeal filed in the Clerk's office of the United States Circuit Court of Appeals for the Second Circuit, wherein James E. Gorman, (intervening petitioner), is Appellant and you are Appellee, to show cause if any there be why the order and decree rendered against said Appellant as in said appeal mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Alfred C. Coxe, Judge of the United States Circuit Court of Appeals for the Second Circuit, this 20th day of February, in the year of our Lord, 1911.

ALFRED C. COXE,
Judge of the United States Circuit Court of Appeals for the Second Circuit.

I hereby acknowledge that the above citation on appeal was served upon me the 20 day of Feby., 1911.

HAYS, HERSHFIELD & WOLF.
Solicitors for Appellee.

185 [Endorsed]: United States Circuit Court of Appeals, Second Circuit. Filed Feb 20 1911. William Parkin, Clerk.

Endorsed on cover: File No. 22,566. U. S. Circuit Court of Appeals, 2d Circuit. Term No. 243. James E. Gorman, appellant, vs. Charles E. Littlefield, trustee in bankruptcy of Albert O. Brown et al., Co-partners, trading under the name of A. O. Brown & Company. Filed March 6th, 1911. File No. 22,566.

18

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1912.

No. 243

IN THE MATTER OF ALBERT O. BROWN ET AL.,
BANKRUPTS.

JAMES E. GORMAN,
Appellant—Intervening Petitioner,

vs.

CHARLES E. LITTLEFIELD, TRUSTEE OF A. O. BROWN ET AL.,
Appellee—Respondent.

APPEAL FROM THE UNITED STATE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF APPELLANT-INTERVENING PETITIONER.

ROBERT DUNLAP,
JAMES L. COLEMAN,
Solicitors for Appellant—Intervening Petitioner.

BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

INDEX TO BRIEF OF APPELLANT.

No. 243.

INDEX TO AUTHORITIES CITED, REFERRED TO OR DISCUSSED.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1912.

No. 243

IN THE MATTER OF ALBERT O. BROWN ET AL., BANKRUPTS.

JAMES E. GORMAN,
Appellant—Intervening Petitioner,
vs.
CHARLES E. LITTLEFIELD, TRUSTEE OF A. O. BROWN ET AL.,
Appellee—Respondent.

APPEAL FROM THE UNITED STATE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF INTERVENING PETITIONER AND APPELLANT.

This is an appeal from an order, judgment and decree of the Circuit Court of Appeals for the Second Circuit, affiming an order, judgment and decree of the District Court of the United States for the Southern District of New York, setting aside the report of the Referee and Special Master and dismissing the petition of James E. Gorman, intervening petitioner, filed in the bankruptcy proceedings against A. O. Brown & Co, in which petition Gorman claimed ownership of 250 shares of the cap-

ital stock of the Greene Cananea Copper Company found in the possession of the bankrupts, which James E. Gorman claimed and now claims to own, and against which shares it is admitted by Respondent no claim has ever been made by any one else, and which shares Respondent admits should have been held by the bankrupts for James E. Gorman. The question for decision, therefore, is whether James E. Gorman is entitled to said 250 shares or whether the general creditors have a right to share in property which never belonged to them or the bankrupts or the trustee, but always belonged to James E. Gorman, and thus to deprive him of his property.

On November 24, 1908, J. E. Gorman, intervening petitioner, filed two intervening petitions, one praying for an order against the receiver, now the trustee in bankruptcy, for the delivery of Certificate 3782 for 100 shares of capital stock of the Chicago Subway Company and the other for a like order for the delivery of certificates for 250 shares of the capital stock of the Greene Cananea Copper Company. (Rec., 1-2.)

(These cases were consolidated; the Referee and Special Master recommended that the prayer in each petition be granted (Rec., 82, 83, 84, 85) and the District Court confirmed the report as to the Subway stock but set it aside as to the Greene Cananea stock. (Rec., 86-87.) We shall, therefore, consider only the Greene Cananea stock.)

Petitioner alleged in his petition (Rec., 1-2) and affidavits supporting same (Rec., 1 to 10 inclusive)

that the Greene Cananea stock was bought for him by A. O. Brown & Co. and paid for by him on April 14, 1908, and that he directed that the shares should be kept in the possession of said A. O. Brown & Co. until further orders; that he demanded delivery of the shares of stock from Charles E. Littlefield, as Receiver of said bankrupts—and that said Receiver refused and still refuses delivery; and prayed for an order directing said Charles E. Littlefield as Receiver of Albert O. Brown, G. Lee Stout, Edward F. Buchanan, Lewis G. Young, Samuel C. Brown and W. Rhea Whitman, bankrupts herein, to return and deliver the said certificate or certificates of stock to intervening petitioner, and for such other or further order or relief as to the court might seem just.

Petitioner filed an affidavit containing accounts rendered to him by said A. O. Brown & Co., showing that said stock was being held by them for him (Rec., 5), Exhibit A (Rec., 6), showing the same as of June 30th to July 31, 1908, and Exhibit B (Rec., 7), showing the same as of July 31st and August 25, 1908, when the firm suspended. Supporting the allegations in petition were affidavits of Charles T. Atkinson, manager of A. O. Brown & Co.'s Chicago office in the Railway Exchange (Rec., 8); Oliver A. Olmstead, manager of A. O. Brown & Co.'s Chicago office in the Commercial National Bank Building (Rec., 9); and Clarence Lasier who was in charge of accounts for A. O. Brown & Co. (Rec., 10), all of which state that intervening petitioner on April 14, 1908, purchased and paid for 250 shares of Greene Cananea stock and ordered it held in his name—and

that A. O. Brown & Co.'s monthly reports showed said stock as being carried for him up to the date of the assignment.

The answer of the Receiver admits the institution of bankruptcy proceedings against A. O. Brown & Co. and the individual members thereof—but otherwise is in substance a general denial. (Rec., 11.)

The case was on November 16, 1908, referred to John J. Townsend, Referee in charge as Special Master for examination, testimony and report. (Rec., 1.) The District Court on February 16, 1909 (Rec., 12-13), entered a general order in the matter of A. O. Brown *et al.* requiring creditors claiming stock and other assets, or the proceeds thereof, to file their claims on or before March 1, 1909—and by the same order "the determination of all rights, title and interests, if any, in and to any and all of said stocks, bonds, securities and other assets, or the proceeds thereof, made as aforesaid, be and the same hereby is referred to Hon. John J. Townsend, who is hereby appointed Special Master for that purpose, to hear and determine the rights of all such creditors and claimants, including the Receiver and Trustee in Bankruptcy herein; and the said Master is directed in all respects to adjust, determine and adjudicate the rights, titles, interests, equities, claims and liens therein and thereto, and report to this court his determination thereon."

These orders were made on motion of Hays, Hershfield & Wolf, attorneys for the Receiver and Trustee. (Rec., 13.)

The facts:

The facts in this case are undisputed and are set forth in the following report of the Referee. (Rec., 82 to 85.) No exception was taken by the Trustee to the findings of fact.

> "I, John J. Townsend, Referee in charge of this case, have before me as Special Master for examination, testimony and report, two petitions of James E. Gorman, filed in the office of the Clerk December 7, 1908, by his attorney, Walker D. Hines. One petition prays for an order against the Receiver, now the Trustee, for the delivery of Certificate No. 3,732 for 100 shares of the capital stock of the Chicago Subway Company, and one petition prays for a like order for the delivery of certificates for 250 shares of the capital stock of the Green Cananea Copper Company. The latter stock, it is alleged, was bought and paid for by the claimant April 14, 1908, and the former, it is alleged, was bought and paid for by the claimant August 24, 1908, the day preceding the failure in New York City. The answer of the Receiver, now the Trustee, filed December 8, 1908, in the office of the Clerk, is in substance a general denial.
>
> The petition filed December 7, 1908, was returnable November 30, 1908, having been served on the attorneys for the Receiver November 25, 1908. This petition seems to have been preceded by a motion for like relief based on affidavits returnable November 16, 1908, filed on that day in the office of the Clerk, when it was also referred to the Referee in charge as Special Master for examination, testimony and report.
>
> On an affidavit of the attorney for the claimant, filed in the office of the Clerk January 22, 1909, as to the necessity of a deposition to take the testimony of certain witnesses in Chicago, such deposition was so taken, was returned to the Clerk's office in this District January 27,

1909, and was offered in evidence before me April 29, 1909.

The Trustee concedes (p. 76 of the S. M.) that he has in his possession Certificate No. 5732 (erroneously referred to in the moving papers and the testimony as Certificate No. 3732) for 100 shares of Chicago Subway stock actually received by the firm on August 24, 1908, in executing the order of the claimant. The Trustee's counsel, Mr. Wolf, also concedes (p. 55) that the Trustee has in his possession 350 shares of Green Cananea Copper stock endorsed in blank, made up of different certificates.

There is a fair presumption from the testimony of Mr. Ralph Wolf, the counsel for the Trustee (pp. 53-54) that there are no claims other than that of the claimant against Certificate No. 5732 for 100 shares of Chicago Subway stock or against the 350 shares of Green Cananea Copper stock, at least to the extent of 250 shares of that stock. I shall assume for present purposes that there are no claims other than that of the present claimant, with leave to the Trustee to bring to the attention of the court on any application for an order on this report, the fact of any other claims of which he may be advised.

The testimony taken before me, the ledger account between the claimant and A. O. Brown & Co., which is apparently accepted by all parties as correct, and the accompanying explanatory letter addressed to me by Mr. Ralph Wolf, the counsel for the Trustee, dated November 16, 1909, satisfies me that the facts in this case are in substance as follows:

I do not refer to the testimony taken on deposition in Chicago, because I understand from the brief of the claimant that it is not in any way in conflict with the testimony taken before me, but confirmatory of it.

The claimant for a year or more before the failure of A. O. Brown & Co. was a customer dealing with one of the Chicago offices of that

firm, both buying stocks on margin and purchasing them paying in full.

On or about April 14, 1908, he directed the Chicago office to buy 250 shares of Green Cananea Copper stock. The stock was bought on the understanding that it was to be paid for in full, this being the condition on which the brokers consented to execute the order. I also find that at the time the order was executed, the claimant had an ample credit balance with the firm applicable on the books to the payment in full for 250 shares of Green Cananea purchased, and that such also was the belief of the parties. I also find that the stock was left by the claimant in the possession of the brokers subject to his future order. The testimony of Mr. Wolf (pp. 54-55) satisfies me that the particular certificates delivered to the firm under the purchase made for the account of the claimant, were thereafter delivered in completion of other outstanding contracts of sale of the same stock for other customers of the firm. The testimony of the cashier of the firm, Jackson Waldo Rhoades, satisfies me (p. 69) that certificates of stock purchased for clients which were paid for in full by the clients or purchased on margin, were placed without discrimination in the same tin box, and that it was customary to take certificates to make delivery from that box (p. 71) indiscriminately, unless the certificate had been transferred to the name of the customer.

In this connection, I remind the Court of the admission of the Receiver, now the Trustee, that he has in his possession unendorsed some 350 shares of Green Cananea Copper stock.

The claimant at no time before the failure received his 250 shares of Green Cananea Copper stock, nor did he order its sale. The same is true of the 100 shares of Chicago Subway stock.

Coming to the 100 shares of Chicago Subway stock, I find that it was ordered and purchased through the Chicago office, August 24, 1908, the

day before the failure, the purchase being made on the understanding of the parties that the stock was to be paid for in full, and the understanding of the parties being to the effect that the claimant's credit balance was ample for that purpose, as I find it to have been as a matter of fact.

It is a significant feature that at the dates of both the above purchases, the account shows corresponding sales of other securities for the account of the claimant.

The Chicago margin slate produced before me, also indicates that the brokers regarded the two items of securities in their possession as paid for in full by the claimant. I read the testimony of John B. Nevel, the New York margin clerk, to be to the same effect as to these two items of securities (p. 61).

I find that on no account was the claimant at the date of the failure indebted to the firm, and that he was entitled to receive from them at that date the certificate No. 5732 for 100 shares of Chicago Subway stock now in the possession of the Trustee, and 250 shares of Green Cananea Copper stock.

I recommend that the claimant be granted an order directing the Trustee to deliver to him the certificate No. 5732 for 100 shares of Chicago Subway stock conceded by all parties to have been bought by the firm on August 24, 1908, for the account of the claimant.

With regard to the Green Cananea Copper stock, it appears affirmatively that the particular certificates delivered to the firm for the account of the claimant at the date of the original purchase, in April, 1908, were delivered to third parties by the firm in completion of outstanding contracts with those parties. At the same time, it appears that the Receiver, now the Trustee, has in his possession certain certificates endorsed in blank for an aggregate of 350 shares against

which *prima facie* no claim has yet been filed with the Receiver or the Trustee, although I understand the time for filing any such claims has expired. The presumption is that such shares, at least to the extent of 250, were in the possession of the brokers, at the time of their failure, for the account of the claimant. The presumption of right-doing rather than of wrong-doing should be indulged in. Under *Richardson* v. *Shaw* (U. S. Supreme Court), 19 A. B. R., 717, page 724, I regard it as immaterial that the particular certificates delivered to the brokers at the time of the original purchase did not remain in their possession or did not come into the possession of the Receiver, now the Trustee. With this explanation, I recommend an order against the Trustee for the delivery out of the shares now in his possession, certificates to the extent of 250 shares, and that he be authorized to make any endorsement or transfer of the certificates in his possession necessary to carry out the order.

With respect to both stocks, the order should provide that the Trustee should pay to the claimant any dividends that the Receiver or he may have received thereon.

New York, November 22, 1909."

JOHN J. TOWNSEND,
Referee in Bankruptcy, Acting as Special Master.

It was stipulated (Rec., 35) that Charles E. Littlefield, Trustee for A. O. Brown & Co., has 350 shares of Greene Cananea Copper stock, indorsed in blank, made up of different certificates, and according to the books A. O. Brown & Co. at the date of the assignment ought to have had on hand, if there were no other claims between them, 250 shares of Greene Cananea Copper stock for James E. Gorman.

Mr. Wolf also testified that he was in charge in

behalf of the Trustee or his counsel of all claims against A. O. Brown & Co., and that at the date of his testimony, February 11, 1909, he did not know of any claims against A. O. Brown & Co. for shares of stock of the Greene Cananea Copper Company except Mr. Gorman's. (Rec., 35.) In this connection attention is called to the order of court, entered on motion of the attorneys for the Trustee and Receiver, requiring all creditors claiming stocks to file their claims on or before March 1, 1909. (Rec., 12-13.) The Master requested the Trustee to advise him if any claim came up subsequently as to the Greene Cananea (See Master's Report, Rec., 83, 4th paragraph, last sentence), but up to the date of the Report of the Master, December 2, 1909, no claim had been made against the Greene Cananea stock, and the time for filing such claims has long since expired. The Trustee has never reported that any claim has been filed other than appellant's.

Attention is called to the fact that the firm of A. O. Brown & Co. sent monthly statements to Mr. Gorman from the time of purchase to the date of the assignment, which showed that the firm was holding for Mr. Gorman 250 shares of Greene Cananea Copper stock. (See Exs. A and B, Rec., 6-7; also Rec., 8, Atkinson.)

James E. Gorman at no time received his 250 shares of Greene Cananea Copper stock, nor did he order its sale. (See Master's Report, Rec., 84.)

Intervening petitioner (appellant here) asked the District Court to confirm said report of the Referee as Special Master (Rec., 85), and the District Court

on January 15, 1910, confirmed as to the 100 shares of Chicago Subway stock, but set aside the recommendation that the Trustee deliver James E. Gorman the 250 shares of Greene Cananea stock. (Rec., 86-87.) The District Judge made the following memorandum (Rec., 86):

> "It is useless to do more than refer to the McIntyre case. Claimant can get only:
> 1st. What is his, and,
> 2nd. In Trustee's possession. Similarity of kind does not prove specific property. Report set aside except as to Chicago Subway stock. No costs."

Intervening petitioner (appellant here) prayed an appeal to the Circuit Court of Appeals and it was allowed June 17, 1910, by the District Judge. (Rec., 89-90.)

An attempt was made by the Trustee to dismiss the appeal on technical grounds (Rec., 93, 94), but without success. (Rec., 95, 96.)

The appeal was therefore heard upon the merits of the case by the Circuit Court of Appeals for the Second Circuit, and said Circuit Court of Appeals on January 9, 1911, affirmed with costs the order and decree of the District Court for the Southern District of New York. (Rec., 96, 97.) The opinion of the Circuit Court of Appeals is contained on Rec., 96-97.

From the order, judgment and decree of the Circuit Court of Appeals for the Second Circuit, intervening petitioner (appellant here) prayed an appeal to the Supreme Court of the United States (Rec., 98), which was allowed on February 20, 1911.

(Rec., 99.) Appellant, Gorman, filed his assignment of errors on appeal (Rec., 102-103) as follows:

SPECIFICATION OF ERRORS.

1. Said court erred in holding that under the evidence the said appellant, James E. Gorman, was not entitled to have delivered to him by the Trustee in Bankruptcy of said A. O. Brown & Co. 250 shares of capital stock of the Greene Cananea Copper Company, out of the 350 unclaimed shares of said stock now in the possession of said Trustee.

2. Said court erred in holding that under the evidence said appellant, James E. Gorman, did not have an equitable right to 250 shares of capital stock of the Greene Cananea Copper Company, out of the 350 unclaimed shares of said stock now in the possession of said Trustee.

3. Said court erred in not ordering the Trustee in Bankruptcy to turn over to said appellant, James E. Gorman, 250 shares of capital stock of the Greene Cananea Copper Company, out of the 350 unclaimed shares of said stock now in possession of said Trustee.

4. Said court erred in holding under the findings of fact contained in the report of said John J. Townsend, Referee and Special Master in said cause, that said appellant, James E. Gorman, did not have an equitable right in and was not entitled to have delivered to him by said Trustee in Bankruptcy 250 shares of capital stock of the Greene Cananea Copper Company, out of the 350 unclaimed shares of said stock now in the possession of said Trustee.

5. Said court erred in reversing, setting aside and not approving in full the conclusions of law and recommendations of John J. Townsend, Referee and Special Master in said cause, to the effect that said appellant, James E. Gorman, was and is entitled to the relief prayed for in his said petition herein as to the 250 shares of capital stock of the Greene Cananea Copper Company, out of the 350 unclaimed shares of said stock now in possession of said Trustee.

6. Said court erred in refusing to approve and in reversing and setting aside the recommendations of John J. Townsend, Referee and Special Master in said cause, as to the 250 shares of capital stock of the Greene Cananea Copper Company, in the words and figures as follows, to-wit:

> "I recommend an order against the Trustee for the delivery out of the shares now in his possession, certificates to the extent of 250 shares, and that he be authorized to make any endorsement or transfer of the certificates in his possession necessary to carry out the order,"

and in refusing to enter an order in accordance with said recommendation.

7. Said court erred in entering an order and decree in said cause to the effect that said appellant, James E. Gorman, was not entitled to have delivered to him 250 shares of the capital stock of the Greene Cananea Copper Company, as prayed for in his said petition; and in refusing to enter an order and decree in said cause that said Trustee deliver to said James E. Gorman 250 shares of capital stock of the Greene Cananea Copper Company out of the

350 unclaimed shares of said stock now in possession of said Trustee.

8. Said court erred in affirming the order and decree of the District Court of the United States for the Southern District of New York in favor of appellee, when it should have reversed the order and decree according to the law of the land.

ARGUMENT.

I.

WHEN A. O. BROWN & CO. PURCHASED 250 SHARES OF GREENE CANANEA STOCK FOR JAMES E. GORMAN AND WERE DIRECTED BY HIM TO HOLD THE SAME FOR FURTHER ORDERS, SAID A. O. BROWN & CO. BECAME TRUSTEES FOR GORMAN AS TO 250 SHARES OF CAPITAL STOCK OF THE GREENE CANANEA COPPER COMPANY. THE RELATIONSHIP BETWEEN THE PARTIES NEVER CONTEMPLATED THAT THE 250 SHARES OF STOCK SHOULD BE EVIDENCED BY ANY PARTICULAR CERTIFICATE OR CERTIFICATES. IT, THEREFORE, RESULTS THAT AS THE TRUSTEE IN BANKRUPTCY HAS IN HIS POSSESSION 350 SHARES OF CAPITAL STOCK OF THE GREENE CANANEA COPPER COMPANY, ENDORSED IN BLANK, WHICH WERE FOUND IN THE SAME TIN BOX IN WHICH GORMAN'S WERE PLACED, UNENDORSED, AND WHICH ARE UNCLAIMED BY ANYONE ELSE THAN GORMAN, THEN GORMAN IS EQUITABLY ENTITLED TO 250 OF SAID SHARES, BECAUSE THE BANKRUPTS AT ALL TIMES SO ADMITTED AND THEIR TRUSTEE STANDS IN THE SHOES OF THE BANKRUPTS, AND NO GENERAL CREDITOR IS PREJUDICED BY GIVING TO GORMAN WHAT WAS ALWAYS HIS, AND NEVER BELONGED TO THE BANKRUPTS, AND UPON THE FAITH OF WHICH NO CREDITOR GAVE CREDIT TO THE BANKRUPTS.

When on April 14, 1908, James E. Gorman, intervening petitioner, purchased and paid for 250 shares

NOTE.—Italics in quotations from cases are ours.

of Greene Cananea Copper stock and ordered A. O. Brown & Co. to hold the same subject to his further orders, there can be no doubt but that A. O. Brown & Co. became trustees for James E. Gorman of 250 shares of the capital stock of the Greene Cananea Copper Company, and that prior to the bankruptcy Gorman might have successfully demanded them and recovered them from Brown & Co. It is also beyond question that the Trustee in Bankruptcy stands in the shoes of Brown & Co., the bankrupts.

The facts show that 250 shares of such stock were purchased by Brown & Co. for James E. Gorman, represented by four certificates which were thrown into a tin box indiscriminately and mixed up with stock certificates of every kind and nature held by Brown & Co., as trustees for clients, pledgees, or in their own name. When that same tin box came afterwards into the hands of the Receiver and Trustee in Bankruptcy, certificates representing 350 shares of Greene Cananea Copper stock were found therein and no claim has been filed against the same by any person other than James E. Gorman. In the interim between the purchase and the bankruptcy Brown & Co. advised Gorman monthly that they were holding 250 shares of such stock for him. *The question for solution, therefore, is whether James E. Gorman is not equitably entitled to* 250 *shares of the capital stock of the Greene Cananea Copper Company out of the* 350 *shares of stock of that company found in that same tin box in the hands of the Trustee and against which no other claim has been filed.*

It seems plain that the right or equity of Gorman to the shares is superior to that of the general creditors of the bankrupt for the reason that Brown & Co. were holding such shares as Trustee, as is admitted, for Gorman. The general creditors surely never placed any reliance upon Gorman's property in the hands of Brown & Co.; they did not contract upon the faith of it; and as Brown & Co. never owned the property the Trustee in Bankruptcy cannot now claim it for the creditors because it never was part of the estate or assets of Brown & Co., the bankrupts.

Against this obvious and unquestioned equity the Trustee in Bankruptcy contended in the court below that on April 14, 1908, the date Gorman ordered Brown & Co. to purchase 250 *shares* of Greene Cananea stock, the Bankrupts, Brown & Co., had by some mental process unknown to Gorman determined that *certain certificates* which had come into their possession, should be designated as being in fulfillment of Gorman's order. These certificates were numbered A-335, Y-11083, B-6589, and B-6537. Between the date of Gorman's order and May 14, 1908, these *particular certificates* were passed on to other brokerage firms or customers in the course of business and are not now in the "tin box" which came to the Trustee in Bankruptcy. The Trustee contended that this was a *"conversion"* by the bankrupts, and that Gorman cannot trace the above *specific certificates*, A-335, Y-11083, B-6589 and B-6537 or their proceeds to the assets of the Trustee in Bankruptcy, and therefore Gorman is without remedy. Such contention ignores the following important facts:

(1) Gorman never asked the Bankrupts to buy certificates No. A-335, Y-11083, B-6589 or B-6537. *He asked them to buy* 250 *shares of Greene Cananea stock.*

(2) The Bankrupts advised Gorman that they had purchased 250 *shares* of Greene Cananea stock, for him. They did *not* tell him the numbers of the certificates alleged to have been set aside as his.

(3) The Bankrupts never told Gorman they had passed to other brokers or clients specific certificates No. A-335, Y-11083, B-6589 or B-6537.

(4) On the contrary the Bankrupts kept advising Gorman by regular monthly reports, that they were holding for him 250 shares of Greene Cananea stock. At no time prior to the bankruptcy did Gorman ever hear of the specific certificate numbers.

(5) These monthly reports of the Bankrupts in every case assured Gorman that they were holding for him 250 *shares* of Greene Cananea stock. These reports were most comprehensive as to *time;* they included the date of purchase, *i. e.,* April 14, 1908; they included and ran beyond the date of the alleged conversion which had its alleged consummation on May 14, 1908; they included also every time up to the date of Bankruptcy. During all that time the Bankrupts reported they were holding said 250 shares for Gorman. At no time was a specific certificate mentioned.

Such contention of the Trustee also ignores the well established rule of law that a stock certificate has no earmark, and that the duty of the broker does

not require him to keep on hand the exact certificates, but only enough stock to satisfy the customer's order on demand.

It is first necessary to bear in mind that the petitioner, Gorman, is not claiming any specific certificate. He is simply asking that the trustee restore to him 250 shares of stock or evidence of his ownership of 250 shares of the capital stock of the Greene Cananea Copper Company. He is not attempting to reclaim a specific chattel, or a specific certificate, and it is immaterial whether the 250 shares of capital stock were represented by one or several certificates, or whether the particular certificates which A. O. Brown & Co. on April 14, 1908, the date of purchase. had in mind as having been set aside for James E. Gorman were identified in any manner as his particular certificates. If it were material any argument of the Trustee based upon it would be emasculated by the fact that from the date of the purchase to the date of the assignment Brown & Co. in their monthly statements admitted and were advising Gorman that they were holding for him 250 shares of said stock without in any way advising him of the *particular certificates.*

It is well settled that a *certificate* of stock in a corporation is not the property itself, but only the *evidence* of the property in the shares, and as one share of stock is not different in kind or quality from every other share of the same issue and company, the return of a different certificate, or the right to substitute one certificate for another of the same

number of shares, is not a material change in the property right held by the broker for his customer.

See *Richardson* v. *Shaw*, 209 U. S., 365, and cases cited therein.

Sexton v. *Kessler*, 225 U. S., 90.

A. O. Brown & Co. were holding, according to their own admission from the date of purchase, April 14, 1908, to the date of bankruptcy, as trustees for Gorman, 250 shares of capital stock of the Greene Cananea Copper Company. The obligation of the trustee would be fulfilled by delivering to said James E. Gorman any evidence proving him to be the owner of 250 shares of such stock, and the particular certificate or certificates evidencing such ownership would be immaterial.

There was of course no duty upon Brown & Co. to hold any specific certificates. Nor does Gorman's right depend upon the possession by the broker or Trustee in Bankruptcy of any particular certificate.

Richardson v. *Shaw, supra.*

In actions brought by clients against brokers to recover damages for the alleged conversion of specific certificates, on the theory that the broker must hold the identical *certificate*, it has always been held that the broker need not keep the stock separate from the mass, and that he is only obliged to deliver an equal amount of stock and not any specific certificate.

See:

Chancellor Kent's opinion in *Nourse* v. *Prime*, 4 Johnson's Chancery, star page 495 to 497.

See also:

Caswell v. *Putnam*, 120 N. Y., 153; 24 N. E., 287.

Stewart v. *Drake*, 46 N. Y., 449, 453, 454.

Horton v. *Morgan*, 19 New York, 170, 173.

See also:

In re McIntyre & Co. (C. C. A., 2nd Circuit), 174 Fed., 627, 628.

It is plain that in transactions with brokers the identity of particular certificates is never preserved. The accounts are always settled by the requisite number of shares of the designated stock. As was stated in *Harding* v. *Field*, 1 App. Div., 391, 37 N. Y. S., 399, 401, after stating the rule in *Caswell* v. *Putnam*, *supra*, which was quoted with approval by this court in *Richardson* v. *Shaw*, *supra*.

> "This being the extent of the obligation of the agent, it necessarily follows, we think, that the principal, when he seeks to recover his securities bought for him by the agent, is not called upon to put his finger upon the identical certificates, and be able to say that those were the ones purchased for him, but he sufficiently identifies them if he shows that the agent purchased that particular kind of securities, and has the necessary amount in his hands, which he can deliver upon demand."

It is common to mingle the purchases, sales and the pledges of the broker's clients and himself and this is not unlawful.

As was said by Mr. Justice Holmes in the recent case of *Sexton* v. *Kessler*, 225 U. S., 90-97:

> "When a broker agrees to carry stock for

> a customer he may buy stocks to fill several orders in a lump; he may increase his single purchase by stock of the same kind that he wants for himself; he may pledge the whole block thus purchased for what sum he likes, or deliver it all in satisfaction of later orders, and he may satisfy the earlier customer with any stock that he has on hand or that he buys when the time for delivery comes. Yet as he is bound to keep stock enough to satisfy his contracts, as the New York firm in this case was bound to substitute other security if it withdrew any, the customer is held to have such an interest that a delivery to him by an insolvent broker is not a preference. *Richardson* v. *Shaw*, 209 U. S., 365. *Markham* v. *Jaudon*, 41 N. Y., 235. So a depositor in a grain elevator may have a property in grain in a certain elevator although the keeper is at liberty to mix his own or other grain with the deposit and empty and refill the receptacle twenty times before making good his receipt to the depositor concerned."

In the case of *Richardson* v. *Shaw, supra,* Richardson, as Trustee in Bankruptcy of Brown, a broker, sought to set aside as an illegal preference the delivery to Shaw, a customer of Brown, after the latter's insolvency, of the stock purchased by Shaw on margin when Shaw after the date of the insolvency tendered the amount of his debt to Brown. This court, in holding that such delivery did not constitute an illegal preference, based its opinion upon the proposition that the stock though not identified by any specific stock certificate was from the date of original purchase the property of the customer, Shaw, and not of the broker, Brown, subject only to a claim of the broker for money advanced, and this court, in discussing the proposition on page

378, laid down the rule for which we are contending, *that what the customer owned was not necessarily some specific certificate or certificates but the number of shares of stock which such certificate or certificates might represent, and that the individuality of such certificate was in a transaction of that kind a matter of indifference.* On page 378 the court said:

> "When Young, the agent of Shaw & Co., demanded the stocks, their right of ownership in them was recognized, and, while pledged, they were under the control of the broker, were promptly redeemed and turned over to the customer. Consistently with the terms of the contract, as understood by both parties, the broker could not have declined to thus redeem and turn over the stock, and when adjudicated a bankrupt his trustee had no better rights, in the absence of fraud or preferential transfer, than the bankrupt himself. *Security Warehousing Co.* v. *Hand,* 206 U. S., 415, 423; *Thompson* v. *Fairbanks,* 196 U. S., 516, 526; *Humphrey* v. *Tatman,* 198 U. S., 91; *York Mfg. Co.* v. *Cassell,* 201 U. S., 344, 352.
>
> It is objected to this view of the relation of customer and broker that the broker was not obliged to return the very stocks pledged, but might substitute other certificates for those received by him, and that this is inconsistent with ownership on the part of the customer, and shows a proprietary interest of the broker in the shares; *but this contention loses sight of the fact that the certificate of shares of stock is not the property itself, it is but the evidence of property in the shares. The certificate, as the term implies, but certifies the ownership of the property and rights in the corporation represented by the number of shares named.*
>
> *A certificate of the same number of shares, al-*

though printed upon different paper and bearing a different number, represents precisely the same kind and value of property as does another certificate for a like number of shares of stock in the same corporation. It is a misconception of the nature of the certificate to say that a return of a different certificate or the right to substitute one certificate for another is a material change in the property right held by the broker for the customer. *Horton* v. *Morgan*, 19 N. Y., 170; *Taussig* v. *Hart*, 58 N. Y., 425; *Skiff* v. *Stoddard*, 63 Connecticut, 198, 218. As was said by the Court of Appeals of New York in *Caswell* v. *Putman*, 120 N. Y., 153, 157, '*one share of stock is not different in kind or value from every other share of the same issue and company. They are unlike distinct articles of personal property which differ in kind and value, such as a horse, wagon or harness. The stock has no earmark which distinguishes one share from another, so as to give it any additional value or importance; like grain of a uniform quality, one bushel is of the same kind and value as another.*' "

The logic of the above decision seems plain, and it goes to the essential point in our case. Thus, for instance, an assignment of a given number of shares might validly have been made by the brokers by an instrument in writing entirely disconnected from any particular or specific stock certificate. An example would be the assignment of a debt or chose in action.

The stock certificate would be merely evidence of a right to an interest to a given amount in a corporation, which indeed, might well be shown by any other evidence.

This court also followed the leading cases of

Markham v. *Jaudon*, 41 N. Y., 235, and *Skiff* v. *Stoddard*, 63 Connecticut, 216, 26 Atl., 874, and on page 376 commented on these two cases as follows:

> "The subject was fully considered in a case which leaves nothing to be added to the discussion, *Skiff* v. *Stoddard*, 63 Connecticut, 198, in which the conclusions in *Markham* v. *Jaudon* were adopted and approved."

Mr. Justice Holmes, in his concurring opinion, said, on page 385:

> *"I suppose that it is possible to say that after a purchase of stock is announced to a customer he becomes an equitable tenant in common of all the stock of that kind in the broker's hands, that the broker's powers of disposition, extensive as they are, are subject to the duty to keep stock enough on hand to satisfy his customer's claims, and that the nature of the stock identifies the fund as fully as a grain elevator identifies the grain for which receipts are out. It would seem to follow that the customer would have a right to demand his stock of the trustee himself, as well as to receive it from the bankrupt, on paying whatever remained to be paid."*

In the case at bar, however, James E. Gorman had paid in full at the time of the purchase for the stock in question and occupied the stronger position of *cestui que trust*. It must be remembered that this was not the only transaction Gorman had with the brokers. He had a running account and had purchased and sold various stocks through the brokers, sometimes ordering them to sell one block of stock in order to make his credit balance such that he could buy another block of stock.

This court, therefore, has stated that the relationship between the capital stock of a company and any

particular certificate representing the same is not unlike the relationship between an elevator receipt for a bushel of grain in an elevator and that bushel of grain itself. In brief, this court has erased from a stock certificate any earmarks distinguishing one share of stock from another, and this decision reduces our case to one of mingling by a trustee of trust funds with funds of his own.

Of course it is well settled that the duty of the broker is fulfilled when he keeps on hand sufficient shares to satisfy Gorman's claim. The identity of the *certificates* was of no importance. There being enough now on hand it must be assumed they were being held for Gorman, as he was assured by the brokers.

Now, when A. O. Brown & Co. mingled in the big tin box those certificates which they purchased on Mr. Gorman's order no one ever supposed that the particular certificates bought on that day must be given to Mr. Gorman or that those particular certificates stood for any particular or identifiable shares of stock. If then Brown & Co., as trustees, put Gorman's shares in the same tin box in which they kept their own they mingled the funds and if there is enough in the tin box to satisfy Gorman's demands his claim should be satisfied. No one else has made any claim to these 350 shares of Greene Cananea stock. The case is not different than if a warehouse receipt stood for ten bushels of grain, and in that case no one ever would suppose that grain for grain those ten bushels must be the very same as the ten bushels which were put into the ele-

vator at the time the receipt was issued. Or suppose it was a case of money and Brown & Co. were holding $250 of Gorman's and put his money in a tin box with other money and there was left $350 in the tin box unclaimed by anyone but the trustee. Who would say Gorman should not have his $250? He hurts no creditors when he takes what was always his and never theirs.

The contract between the parties did not contemplate that any particular certificate should be bought or held. Any evidence representing the interest of 250 shares in the corporation was sufficient.

The legal duty of the broker which governs in a case of this kind is stated in *Markham* v. *Jaudon, supra,* as follows:

> "The broker undertakes and agrees— * * *
> 4. At all times to have in his name or under his control, ready for delivery, the shares purchased, *or an equal amount of other shares of the same stock.*"

What is a share of stock?

As was said in *Skiff* v. *Stoddard,* 63 Conn., 198, 26 Atl., 874, 880:

> "Shares of stock have no individuality, no earmarks. One share does not differ from another share of like stock in form, characteristic, or value. Each share represents simply an undivided proportionate interest in the ownership of the corporation. It entitled its owner to a certain right in the management, profits and ultimate assets of the corporation, precisely like that which every other share owner enjoys. Certificates of stock which have earmarks are not the stocks; they are only the evidence of the own-

> ership of the stocks. They are the muniments of title, like title deeds. They have no value save as evidence of the things owned, which has nothing individual, distinguishable, or peculiar about it. Courts have therefore said that no good reason existed for requiring that a pledgee of stocks should at all times preserve a careful separation of distinguishable certificates connected with each transaction of pledge, and maintain the identity of each certificate distinct and unbroken. They have said that the essential thing was that he hold at all times the required shares of stock ready to be delivered when called for; and in recognition of this fact, and of the right enjoyed by the pledgee to transfer the stocks held by him in pledge into his own name, they have held that a pledgee fully preserves the rights of the pledgor if he at all times until the termination of the pledge retains similar stock in amount equal to that pledged. This has been held of pledges in their ordinary form as well as of those incidental to margin transactions."

In the case of *Skiff* v. *Stoddard, supra,* the litigants were the customers of a bankrupt stock broker who had, previous to his assignment, pledged as security for a loan to him from another party stocks which had been bought by him for his customers on margin. A few of the actual certificates which had been originally received by the broker could be traced into the hands of the pledgee but in most cases the individual certificates could not be traced. The customers contended that they were entitled to redeem the securities pledged by the bankrupt broker upon payment of the debt secured thereby but the general creditors opposed this contention. The court held in favor of the customers

and went fully into the different situations which might arise in a transaction regarding the purchase of stocks, and said (63 Conn., 225, 26 Atl., 882):

"An attempt on the part of the several plaintiffs to redeem raises legal questions which demand consideration. These questions relate to the necessity of identification and the character and extent of that identification. The pledge relation implies the possession by the pledgee of some property to which the pledge attaches. A pledgor seeking to retake his own must be able to identify it. The burden is upon him, not only to establish the contract relation, but to point out the property of which the contract gives him the right to repossess himself upon redemption. In ordinary cases of pledge, where the property given in security is corporeal, or consists of certain kinds of choses in action, the means of strict identification are usually at hand. In cases like the present, where the pledged property is made up largely of stocks, the problem of identification becomes complicated, by reason of the right in the pledgee to take out in his own name a new certificate and to preserve no separation of particular shares from other like shares held by the pledgee. A strict identification of precise shares is thus oftentimes rendered impossible. Nevertheless, both in law and in fact, shares are being held in pledge. Evidently the rule which demands identification as a prerequisite to repossession must, when such conditions are encountered, receive such reasonable construction and application as will, upon one hand, satisfy the purpose of the rule, and, upon the other hand, do justice to the parties. It will not do to dispense with the necessity of identification. Neither will it do to suffer a permissible practice on the part of the pledgee to deprive a pledgor of his property.

If we look at the conditions which the claims

of the several plaintiffs present, we find that nearly every possible contingency exists. These may be classified as follows:

(1) Where it can be shown that the precise certificates of stock, or evidence of title originally purchased in the execution of a plaintiff's order, were held for him by Bunnell & Scranton at the time of their assignment.

(2) Where it appears that certain particular certificates of stock or evidences of title were by them being carried in fulfillment of a plaintiff's order, although it may be impossible to establish that such certificates or evidences of title were the precise ones originally purchased in the execution of that order.

(3) Where no more precise identification is possible than that Bunnell & Scranton were carrying a block of stocks of a particular kind, sufficient to satisfy the demands for that kind of stock of all their customers, including themselves.

(4) Where it appears that Bunnell & Scranton were carrying a block of stocks of a particular kind, not capable of the precise identification contemplated in classes 1 and 2, and the whole amount of such unidentifiable shares is insufficient to satisfy the demands of all their margin-buying customers, including themselves, but sufficient to satisfy the demands of all such customers, exclusive of themselves, either as individuals or as a partnership.

(5) Where it appears that Bunnell & Scranton were carrying a block of stocks of a particular kind, not capable of the precise identification contemplated in classes 1 and 2, and the whole amount of such unidentifiable shares is insufficient to satisfy the demands of all their margin-buying customers, exclusive of themselves, either as individuals or as partners.

Classes 1 and 2 present no difficulty. The plaintiffs making such identification are clearly

entitled to redeem. This identification being a strict one of precise property, it, of course, follows that it must take precedence of any general identification such as remains to be considered, and gives to the fortunate pledgor the first right to that which is so identified.

The problem of identification and distribution as related to class 3 is not a difficult one. If Bunnell & Scranton were at the time of their failure carrying a block of certain stock, and their contracts called for them to carry that amount of stock, the identification of that stock as being stock carried for these customers, the requisite amount for each, is clearly reasonable and sufficient. The shares being all alike, and merely representing an ownership of a certain undivided interest in a corporation, the interests of all concerned are satisfied by a distribution to each pledgor of his proper number of shares. It has been well said in respect of money that substantial identity does not consist in oneness of pieces of coin or bank bills. Bank v. *King*, 57 Pa. St., 202. *It may be as truly said of identity of shares of stock that it does not consist in oneness of certificates. It is a familiar principle that a fund impressed with a trust may be traced and preserved for its owner so long as it can be identified. The cases are numerous where it has been held that if money so impressed with a trust is followed into a larger fund, or traced into the deposits of a bank, the identification is sufficient to entitle the owner to take as his own an amount equal to his own traced. He does not lose his right to recover his own because he cannot select his particular dollars from the other dollars with which they have become mingled. It is held to be enough that he establishes that his dollars are there, although their strict identity is lost in a mass of other like dollars. Knatchbull* v. *Hallett*, 13 Ch. Div., 713; *National Bank* v. *Insurance Co.*, 104 U. S., 54; *Bank* v. *King*, 57 Pa. St., 202;

Third Nat. Bank v. *Stillwater Gas Co.*, 36 Minn., 75, 30 N. W. Rep., 440; *Van Allen* v. *Bank*, 52 N. Y., 1; *Peak* v. *Ellicott*, 30 Kan., 156, 1 Pac. Rep., 499; Beach Mod. Eq. Jur., Sec. 283. *This principal, with respect to the requirements of identification applied to the shares of stock carried by Bunnell & Scranton, leads to the rule of division here laid down.*

Class 4 presents the same problem, modified only by the additional factor that the shares in Bunnell & Scranton's hands were insufficient to meet the demands of their customers and themselves together. Bunnell & Scranton had the right to do as they pleased with their own. For their customers they were bound to hold and carry the requisite stocks. If they did not have on hand what was called for by their customers' contracts and their own purchases, it will be presumed, in the absence of evidence to the contrary, that the situation arose in a way consistent with their right and duty, and that the stocks on hand were held for their customers. This presumption, however, must yield to the fact. If it appear that certain shares were at the time of the assignment specifically held by the insolvent firm upon the purchases of or for itself or its members, and thus and not otherwise actually carried, the right thereto of the trustee or administrator of such purchase and owner would be as clear as that of a plaintiff who is able to make a like strict identification. Should the exercise of this right by the defendant or the representative of Bunnell or Scranton reduce the amount of any kind of stock remaining below that required to satisfy the demands of customers, the distribution would fall under the principles of class 5, to be considered; otherwise each customer would take his full quota of stock. This rule is in consonance with the accepted principles governing the identification and recovery of funds impressed with a trust. *Knatchbull* v. *Hallett*, 13 Ch. Div., 713;

National Bank v. *Insurance Co.*, 104 U. S., 54; *Bank* v. *Weems*, 69 Tex., 489, 6 S. W. Rep., 802."

It should be remembered that the bankrupts were in the habit of commingling stock of different corporations, whether the stock was owned outright by their customers, whether held as pledges for margin purchases, or bought by themselves, and we respectfully insist that the big tin box became the receptacle for a fund of securities which must be regarded as a trust fund from which A. O. Brown & Company were to meet trust obligations for securities contained therein. And there was an implied trust arising out of the mingling of the stock in favor of Gorman whose stock was mingled and that implied trust would follow certificates even if taken out of the box either erroneously or feloniously by the firm of A. O. Brown & Company.

Brown & Co. were obliged to hold and carry enough Green Cananea stock to satisfy Gorman's rights—and even if they dared claim they had committed a larceny of Gorman's stock, or had through error given Gorman's stock to some one else, equity would remonstrate with them that they intended to do no wrong, but rather right—and that they had committed no irreparable error. Equity would impute to Brown & Co. honest motives. Equity would say the situation arose in a way consistent with their rights and duties and that 250 shares of the stock on hand were held for Gorman. This contention is practically conceded by the trustee's stipulation (Rec., 61), as follows:

"It is stipulated that Charles E. Littlefield, Trustee for A. O. Brown & Co., has three hun-

dred and fifty shares of Greene Cananea Copper Stock endorsed in blank, made up of different certificates, and according to the books A. O. Brown & Company at the date of the assignment ought to have had on hand, if there were no other claims between them, two hundred and fifty shares of Greene Cananea Copper Stock for James E. Gorman."

Having shown, therefore, that the case of *Richardson* v. *Shaw, supra,* erased the earmarks from any particular certificate, the case stands in precisely the same position as though A. O. Brown & Company were holding 250 dollar bills for James E. Gorman on April 14, 1908, and then placed 250 dollar bills in the tin box along with other dollar bills and ten dollar bills, and that from day to day for a period of four months A. O. Brown & Company frequently went to the box and took out some one dollar bills but at the time of the receivership the Receiver had in his hands 350 one dollar bills. Now who would say that James E. Gorman was not entitled to 250 dollars out of the fund? The rule is well established that if trust moneys be wrongfully mingled or changed, equity will follow the trust fund which has been mingled with property of the trustee and fasten upon the whole of the property a lien for the amount of the trust funds.

The earlier English doctrine, as declared in the opinion of Lord Ellenborough in *Taylor* v. *Plumer,* 3 Maule & S., 575, in which were reviewed the prior decisions of the English courts, was to the effect that the owner of property intrusted to another could follow and retake the same from the possession of the holder, whether he were agent, bailee,

or trustee, or from others who were in privity with him, so long as they were not *bona fide* purchasers for value, and this irrespective of whether such property remained in its original form or had been changed into some other form, so long as it could be ascertained to be the same property or the proceeds of the same property, but that the right ceased when the means of ascertainment failed, and it was held that such means of ascertainment failed whenever the property was in the form of money, and had been then mixed and confused in a general mass of money of the same description. The more recent doctrine, however, follows the rule announced in *Re Hallett's Estate* (*Knatchbull* v. *Hallett*), 13 Ch. Div., 696, which is, that if money held by one in a fiduciary character has been paid by him to his account at his banker's, the person for whom he held the money can follow it, and has a charge on the balance in the banker's hands, and that if the depositor has commingled it with his own funds at the bank, and has afterwards drawn out sums upon checks in the ordinary manner, he must be held to have drawn out his own money in preference to the trust money, and that if he destroyed the trust fund "by dissipating it altogether, there remains nothing to be the subject of the trust, but so long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust."

In the case at bar appellant Gorman is simply claiming that the Receiver and Trustee has received Gorman's property mingled with the bankrupts', and asking his own and the equity is a strong one, for

to the extent that the stock in the tin box which has come into the hands of the Trustee is shown to have been augmented by the receipt of the trust fund or its proceeds, general common creditors have no complaint if that is returned to Gorman to which other customers or the brokers have no just title, and to which the broker had no just right. Having shown that 250 shares of Gorman's stock went into the tin box, equity will not presume that if the shares of stock of the Cananea Company supposed to have been earmarked as Gorman's were taken out of the box subsequently they were the property of Gorman, and he is remediless. On the contrary equity will act on the presumption that if Brown & Co. took out from the mingled amounts of stock any Greene Cananea stock they took their own Greene Cananea and left Gorman's in there, or that they substituted for his benefit other Greene Cananea stock found therein. Clearly this is so because in the light of *Richardson* v. *Shaw, supra,* stock has no earmarks. In other words, that they left in the tin box that which they were obligated to retain and did not use it for their own private purposes. Equity would hardly presume that Brown & Co. committed a crime when a nicer presumption is that they intended to do what was right. Now can any reason be assigned why in our case Brown & Co. should not, as between them and the *cestui que trust,* Gorman, have the honest intention attributed to them of drawing out their own Greene Cananea stock and not Gorman's?

The case of *Knatchbull* v. *Hallett* and *In re Hallett's Estate,* 13 Ch. Div., 696, was the case in which

the doctrine was originated allowing a *cestui que trust* to follow his trust money which had been mingled with the money of the Trustee. There Mr. Hallett, a solicitor, was trustee of some bonds. Without authority and improperly he sold them and put the proceeds of those bonds to his credit at the bank, and there mixed them with moneys belonging to himself, and he then drew out by ordinary check moneys from the mixed fund which he used for his own purposes. He died and the account stood that there was more money to the credit of the man than the sum of the trust money paid into it, but if all the payments were applied to it a large portion of the trust money would have been paid out. On page 710, Sir George Jessel, Master of the Rolls, said:

> "If the bailee sells the goods bailed, the bailor can in equity follow the proceeds, and can follow the proceeds wherever they can be distinguished, either being actually kept separate, or being mixed up with other moneys. I have only to advert to one other point, and that is this—supposing, instead of being invested in the purchase of land or goods, the moneys were simply mixed with other moneys of the trustee, using the term again in its full sense as including every person in a fiduciary relation, does it make any difference according to the modern doctrine in equity? I say none. It would be very remarkable if it were to do so. Supposing the trust money was 1000 sovereigns, and the trustee put them into a bag, and by mistake, or accident, or otherwise, dropped a sovereign of his own into the bag. Could anybody suppose that a judge in equity would find any difficulty in saying that the *cestui que trust* has a right to take 1000 sovereigns out of that bag? I do not like to call it a charge of 1000 sovereigns on the 1001 sovereigns, but that is the effect of it. I have

no doubt of it. It would make no difference if, instead of one sovereign, it was another 1000 sovereigns; but if instead of putting it into his bag, or after putting it into his bag, he carries the bag to his bankers, what then? According to law, the bankers are his debtors for the total amount; but if you lend the trust money to a third person, you can follow it. If in the case supposed the trustee had lent the £1000 to a man without security, you could follow the debt, and take it from the debtor. If he lent it on a promissory note, you could take the promissory note; or the bond, if it were a bond. If, instead of lending the whole amount in one sum simply, he had added a sovereign, or had added £500 of his own to the £1000, the only difference is this, that instead of taking the bond or the promissory note, the *cestui que trust* would have a charge for the amount of the trust money on the bond or promissory note. So it would be on the simple contract debt; that is, if the debt were of such a nature as that, between the creditor and the debtor, you could not sever the debt into two, so as to show what part was trust money, then the *cestui que trust* would have a right to a charge upon the whole. Therefore, there is no difficulty in following out the rules of equity and deciding that in a case of a mere bailee, as Mr. Justice Fry has decided, you can follow the money."

On page 727 he continued:

"Now, first upon principle, nothing can be better settled either in our own law, or, I suppose, the law of all civilized countries, than this, that where a man does an act which may be rightfully performed, he cannot say that that act was intentionally and in fact done wrongly. A man who has a right of entry cannot say he committed a trespass in entering. A man who sells the goods of another as agent for the owner cannot

prevent the owner adopting the sale, and deny that he acted as agent for the owner. It runs throughout our law, and we are familiar with numerous instances in the law of real property. A man who grants a lease believing he has sufficient estate to grant it, although it turns out that he has not, but has the power which enables him to grant it, is not allowed to say he did not grant it under the power. Wherever it can be done rightfully, he is not allowed to say, against the person entitled to the property or the right, that he has done it wrongfully. That is the universal law.

When we come to apply that principle to the case of a trustee who has blended trust moneys with his own, it seems to me perfectly plain that he cannot be heard to say that he took away the trust money when he had a right to take away his own money. The simplest case put is the mingling of trust moneys in a bag with money of the trustee's own. Suppose he has a hundred sovereigns in a bag, and he adds to them another hundred sovereigns of his own, so that they are commingled in such a way that they cannot be distinguished, and the next day he draws out for his own purposes £100, is it tolerable for anybody to allege that what he drew out was the first £100, the trust money, and that he misappropriated it, and left his own £100 in the bag? It is obvious he must have taken away that which he had a right to take away, his own £100. What difference does it make if, instead of being in a bag, he deposits it with his banker, and then pays in other money of his own, and draws out some money for his own purposes? Could be say that he had actually drawn out anything but his own money? His money was there, and he had a right to draw it out, and why should the natural act of simply drawing out the money be attributed to anything except to his ownership of money which was at his banker's."

And on page 730 he said:

> "No human being ever gave credit to a man on the theory that he would misappropriate trust money, and thereby increase his assets. No human being ever gave credit, even beyond that theory, that he should not only misappropriate trust moneys to increase his assets, but that he should pay the trust moneys so misappropriated to his own banking account with his own moneys, and draw out after that a larger sum than the first sums paid in for the trust moneys. It never could have been made a rule of conduct, or have affected the transactions of mankind and therefore it does not come within the line of cases which, having established a rule of conduct, no judge could interfere with."

And in the same cases Lord Justice Baggallay in his concurring opinion said, on page 735:

> "Let me illustrate my meaning. On a certain day I receive £10 of trust money, in sovereigns, and place them in a drawer in my desk, the next day I receive £10 of my own moneys, also in sovereigns, and place them in the same drawer; on the third day I require £5 for my own private purposes, and I take out five sovereigns from the mixed fund in the drawer—an application of the principle embodied in the proposition of Lord Justice Knight Bruce would appropriate the five sovereigns taken out on the third day to the £10 of my own moneys placed in the drawer on the second day, and not to the £10 of trust money placed there on the first day. Again, I receive a cheque for £100 on a trust account, it will not be required for a few days, and it is too large a sum to be kept in my desk, I pay it into a bank, and on the following day receive £100 on my own private account, and not wanting it for a few days I pay it into the same account; I require £50 to £100 for my own purposess before the time arrives for re-

quiring any money for trust purposes, and I accordingly draw against the mixed fund for the £50 or £100. *Can any reason be assigned why in this latter case, as well as in the former, I should not, as between myself and my cestui que trust, have the honest intention attributed to me of drawing against my own private funds, and not against the trust fund, though it was the first paid in?"*

And in our case we are only insisting that as the stock had no earmarks the honest intention should be attributed to Brown & Co. of drawing out their own stock and not Gorman's.

That case was followed with approval by this court in the case of *National Bank* v. *Insurance Company*, 104 U. S., 54, 68. In that case Dillon opened a banking account in his own name as general agent of an insurance company, which was his chief business, and the account was opened to facilitate that business and used as a means of accumulating premiums on policies collected by him for the company and of making payment to it by checks. Dillon deposited his own money with money in the bank account and drew checks upon it for his private use. Dillon also borrowed money from the bank for his personal use and when the note became due and Dillon did not pay it the bank charged the note to the account as general agent. Dillon continued to make deposits in the account and drew checks upon it and when the account was closed it showed a credit balance if the note of $10,000 was not properly chargeable, of $11,000.86. The insurance company filed a bill to collect the $11,000.86, claiming it to be a trust fund, and

the question was as to whether its identity had been destroyed by the mingling.

This court held that as long as trust property can be traced and followed, the property into which it has been converted remains subject to the trust, and if a man mixes trust funds with his own, the whole will be treated as trust property, except so far as he may be able to distinguish what is his. This doctrine applies in every case of a trust relation as well to moneys deposited in bank, and to the debt created thereby, as to every other description of property.

In the case of *Van Allen* v. *American National Bank*, 52 N. Y., 1, which was cited with approval in *National Bank* v. *Insurance Co.*, 104 U. S., 54, it was held that when one deposits in a bank to his own account the proceeds of property sold by him for his principal under instructions thus to keep it, a trust is impressed upon the deposit in favor of the principal and his right thereto is not affected by the fact that the agent at the same time deposits other moneys belonging to himself; nor is it affected by the fact that the agent, instead of depositing the identical moneys received by him on account of his principal, substitutes other moneys therefor. The question of the mingling of trust funds was carefully analyzed under the English authorities. On page 7 the court said:

> "It is objected also that the money was so mingled with the agent's own money as not to be traceable in the hands of the defendant. *When Van Allen & Rice deposited this money for the plaintiff they included with it a few dollars of their own. But this does not affect the plain-*

tiff's right to it. When a trustee deposits trust moneys in his own name in a bank with his individual money, the character of the trust money is not lost but it remains the property of the cestui que trust. If such money can be traced into the bank, and it remains there, the owner can reclaim it. When deposited, the bank incurred an obligation to repay it, which is not lessened or impaired because it incurred, at the same time, an obligation to pay other money belonging to the agent individually. If A sells B's horse for $100 *and puts it in a box with* $100 *of his own, the* $100 *of B may be claimed by him although the particular bills constituting it could not be identified. So if the same* $200 *were deposited in a bank to the credit of A, the title of B to* $100 *would not be affected by the association, and the bank would owe that money to B in equity, although it owed A also for his individual money. These views are not only consonant with integrity and justice, but are fully sustained by authority."*

In the recent case of *In re A. O. Brown & Company, ex parte Gibbons-Hoverman*, 171 Fed., 254, a transaction like the one here under consideration, and arising out of the same failure, was decided in accordance with our contention by Judge Hand, who held that there is no earmark on shares of corporate stock purchased in the market and held by a broker for his customer and that where the bankrupt brokers had delivered to others the identical certificates of stock purchased for a customer and at the time of the failure had on hand other stock of the same character it would be presumed, in the absence of evidence to the contrary, that they properly used their own money to purchase the stock in their pos-

session and intended to apply the same to make good their misappropriation, or mistake.

See also *Baker* v. *Bank,* 100 N. Y., 31; 2 N. E., 452.

American Sug. Co. v. *Fancher,* 145 N. Y., 552; 40 N. E., 206.

In the case of *Erie Railroad Co.* v. *Dial,* C. C. A., 6th Circuit, 140 Fed., 689, before Judges Lurton, Severens and Richards, a manufacturing corporation, a short time before its bankruptcy, purchased rubber to manufacture into tires, which was to be paid for on delivery. The rubber was shipped with drafts attached to the bill of lading. The railroad company unloaded the rubber upon a platform near the bankrupt's factory, on which freight destined to the bankrupt and other parties in that locality was customarily unloaded and to which there was a switch track, and it was forthwith taken and used by the bankrupt with other rubber, in the making of tires before the drafts were presented, and the same were not paid. Claims having been made on the railroad company by the shippers for wrongful delivery, that company purchased and took assignments of the claims of the shippers against the bankrupt, and it was held that the action of the bankrupt in taking possession of the rubber and mingling it with its own property without making payment therefor was wrongful, and gave it no title as against the shippers or their assignee, who succeeded to their rights, and that such assignee was entitled to recover from the bankrupt's trustee, in preference to general cred-

itors, the value of such portion of the rubber or its proceeds as came into his hands.

On page 691 the court held that a court of equity will accord a lien in favor of the owner upon the mass of property for the value of the things intermingled and that the interest of the trustee in bankruptcy was no other or greater than that of the bankrupt. The order of the District Court refusing to allow the claim as preferential was, therefore, reversed and the cause remanded with instructions to ascertain what part of the assets of the bankrupt were chargeable with a lien in favor of the petitioner upon the principles affirmed by this opinion, to take proofs if necessary, and to pay those claims of the petitioner which were acquired from the shippers with interest from the time they accrued to the extent of the sum of such assets. That was done because the proceedings in the court below did not go far enough to fix data necessary for the Appellate Court to make a decree.

See also:

In re Berry (C. C. A., 2nd Circuit), 147 Fed., 208.

In re Graff, 117 Fed., 343.

Smith v. *Mottley*, 150 Fed., 266.

Hurley v. *A. T. & S. F. Ry. Co.*, 213 U. S., 126.

In the case of *Baker* v *New York Bank*, 100 N. Y., 31, it was held that the right of a principal to trust moneys was not affected by the fact that the agents used the specific proceeds of the sales and deposited other moneys to make up the amount so used; that

such deposits, being substituted for the original proceeds, became impressed with the trust, and subject to the same equities. It was also held that it was immaterial that the proceeds of sales of goods belonging to other parties were deposited in the same account.

In the light of the above authorities it seems quite plain that Gorman is entitled at least as between himself and the bankrupts to 250 shares of Greene Cananea stock. It is beyond doubt that he could have lawfully demanded and received the same prior to the bankruptcy.

It remains only to be considered whether the bankruptcy and the interposition in the situation of a Receiver and Trustee in Bankruptcy in any way changes Gorman's rights to what was always his property and never the property or assets of the bankrupts and upon the faith of which property of Gorman it cannot be claimed that the general creditors extended credit to the bankrupts. This is considered under point II immediately following.

II.

THE TRUSTEE STANDS IN THE SHOES OF THE BANKRUPTS. HE TAKES THE PROPERTY SUBJECT TO EQUITIES, AND HAS NO BETTER RIGHTS THAN THE BANKRUPTS. THE INTERPOSITION OF A TRUSTEE IN BANKRUPTCY DOES NOT GIVE TO GENERAL CREDITORS ANY RIGHTS TO PROPERTY TO WHICH THEY ARE NOT ENTITLED.

AS THE 250 SHARES OF STOCK CLAIMED BY GORMAN ALWAYS BELONGED TO HIM AND NEVER TO THE BANKRUPTS, AND AS THE GENERAL CREDITORS NEVER EXTENDED CREDIT TO THE BANKRUPTS ON THE FAITH OF GORMAN'S STOCK, AND CERTAINLY NEVER EXTENDED CREDIT TO THE BANKRUPTS ON THE FAITH THAT SAID BANKRUPTS WOULD MISAPPROPRIATE GORMAN'S STOCK, IT REMAINS THAT TO DENY GORMAN'S CLAIM WOULD NOT ONLY DEPRIVE HIM OF HIS PROPERTY, BUT WOULD GIVE TO THE GENERAL CREDITORS THAT TO WHICH THEY ARE NOT ENTITLED AND WHICH THEY COULD NOT IN EQUITY OR GOOD CONSCIENCE RETAIN.

The facts in this case show that Gorman is entitled to 250 shares of Greene Cananea stock, as he has bought and paid for the same. He could have at any time before the bankruptcy demanded and received them and no general creditor could complain. As a matter of fact no general creditor extended credit to the bankrupts on the faith of Gorman's stock; such creditors never knew anything about Gorman or his stock. Does the Receivership give them a right to Gorman's property? If the bankrupts had retained the specific certificates A-335, Y-11083,

B-6569 and B-6537, as they might have done, would the general creditors have a right to them? Surely not. Then why does the substitution of certificates work any injury to the general creditors? It does not. Surely the general creditors will not contend that they extended credit to the bankrupts on the faith that said bankrupts would steal, or misappropriate Gorman's property.

As was said by Sir George Jessel, Master of the Rolls, in *Knatchbull* v. *Hallet,* 13 Ch. Div., 696, on page 730:

> "No human being ever gave credit to a man on the theory that he would misappropriate trust money and thereby increase his assets."

Yet, in its last analysis, such is the contention of the Trustee-Appellee.

Opposed to this is our contention that Gorman dealt with the bankrupts on the faith that they were his Trustees for his stock—that they always so admitted to him.

In the case of *In re Berry et al.* (C. C. A., 2nd Circuit), 147 Fed., 208, Raborg & Manice were brokers on the New York Stock Exchange and Berry & Co., the bankrupts, were also brokers on the Consolidated Stock Exchange. On November 11, 1904, by virtue of the sale of stock made by Raborg & Manice for Berry & Co., the latter received a credit of $2,675.00 on the books of the former, and on the same day the money was paid over to Berry & Co. On November 14th, through a mistake of the bookkeeper of Raborg & Manice, the said amount of $2,675.00 was again credited to Berry & Co., but the mistake was not dis-

covered until after the failure on November 26th, when they made a general assignment for the benefit of their creditors. On the day previous, November 26th, between two and three o'clock in the afternoon, in response to a demand for "some money" by Berry & Co., Raborg & Manice, after consulting the books and learning that there was a balance of about $2,500 due Berry & Co., drew two checks for $1,000 and $500, respectively, and sent them by messenger to Berry & Co., who deposited them to their credit in the Hanover National Bank. On November 28th a petition in bankruptcy was filed against Berry & Co. by their creditors.

On page 209 the court said:

> "There is no dispute as to the fact that through a mistake in bookkeeping, growing out of the failure of Berry & Co. to deliver certificates on their stock sale which were a good delivery on the Stock Exchange, a credit of $2675 was given them to which they were not entitled. Relying on this credit the payment of $1500 was made. The fact was that at the time the balance was the other way, Berry & Co. owing Raborg & Manice the sum of $139. Had the true situation been known the additional payment would not have been made. Stripped of all complications and entanglements we have this naked fact that Raborg & Manice by mistake paid Berry & Co. $1500, which they did not owe and which Berry & Co. could not have retained without losing the respect of every honorable business man.
>
> It is conceded on all hands that had not insolvency and bankruptcy intervened Raborg & Manice could have recovered the money on an implied assumpsit in the event that Berry & Co. declined to return it after knowledge of the facts—a highly improbable contingency. Of

course such an action would lie. On no possible theory could the retention of the money by Berry & Co. be justified; it was paid to them and received by them under mistake, both parties believing that Raborg & Manice owed the amount.

If $1500 *had been placed in a package by Raborg & Manice and delivered to a messenger with instructions to deposit it in their bank, and the messenger, by mistake, had delivered it to Berry & Co. it will hardly be pretended that the latter would acquire any title to the money, and yet the actual transaction in legal effect gave them no better right.*

It is urged that to compel restitution now will work injustice to the general creditors of the bankrupts, but this contention loses sight of the fact that the money in dispute never belonged to the bankrupts, and their creditors, upon broad principles of equity, have no more right to it than if the transaction of November 25th had never taken place. If the trustees succeed on this appeal the creditors will receive $1500, *the equitable title to which was never in the bankrupts. There can be no doubt of the fact that the payment to Berry & Co. was a mistake and that by reason of this mistake the trustees have in their possession* $1500 *which, otherwise, they would not have. The proposition that Raborg & Manice, who have done no wrong, shall be deprived of their property and that it shall be divided among creditors to whom it does not fairly belong, is not one that appeals to the conscience of a court of equity.*

The rule invoked by the District Court is well stated by Judge Story:

'The receiving of money, which, consistently with conscience cannot be retained is in equity, sufficient to raise a trust in favor of the party for whom, or on whose account, it was received. This is the governing principle in all such cases. And, therefore, whenever any interest arises, the true question is not whether money has been

received by a party, of which he could not have compelled the payment, but, whether he can now, with a safe conscience, *ex aequo et bono,* retain it. Illustrations of this doctrine are familiar in cases of money paid by accident or mistake or fraud. * * * Still, however, there are many cases of this sort, where it is indispensable to resort to courts of equity for adequate relief, and especially where the transactions are complicated, and a discovery from the defendant is requisite.' Story Eq. Jurisdiction, Vol. 2, Secs. 1255-1256.

See also, *Nat. Bank* v. *Ins. Co.,* 104 U. S., 54, 26 L. Ed., 693; *Am. Sugar Ref. Co.* v. *Fancher,* 145 N. Y., 552, 40 N. E., 206, 27 L. R. A., 757.

When the money was paid under a plain mistake of fact equity impressed upon it a constructive trust which followed it through the bank and into the hands of the trustees.

The account of Berry & Co. was never overdrawn during the day of November 25th; there was as much as $5,000 to their credit during that day and at no time did the withdrawals reduce the balance below $1,500. It is true that large sums were checked out after the deposit of the $1,500, but the law presumes that the amounts withdrawn were not those impressed with the trust. In other words, so long as $1,500 remained in the bank, the presumption is that it was the trust fund.

It is unnecessary to enter further into details of the bank's transactions subsequent to the failure; it is enough to say that as the final result of the bank's liquidation of the account $6,310.41 was delivered to the trustees in bankruptcy. But for the mistake of Raborg & Manice this sum would have been $4,810.31, which is all the banrkupts' creditors are entitled to. The $1,500 should be paid by the trustees to Raborg & Manice, its lawful owners.

The language of Judge Jenkins in *Standard Oil Co.* v. *Hawkins,* 74 Fed., 395, 20 C. C. A.,

468, 33 L. R. A., 739, is applicable to the present situation. At page 402 of 74 Fed., page 475, of 20 C. C. A. (33 L. R. A., 739), he says:

'Here the receiver is an officer of the law, having the assets in *custodia legis*. He has no interest in the fund save to see that it shall be distributed among those entitled to it according to the highest principles of honesty, and of equity. The assets of the bank received by him are, with respect to the question in hand, to be treated as an entirety. Those assets have been swelled by the property of the appellant wrongfully obtained by the bank, and which went into the possession of the receiver. That in the payment of dividends he has disbursed the actual money so received can make no difference, so long as assets remain out of which restitution can be made. The creditors have received that to which they were not entitled, and that which belonged to the appellant. If restitution be made out of the assets still remaining, the creditors will receive no less than that to which they were originally entitled, and the appellant will only receive that which was its due. To compass such a result is the highest equity, since otherwise the appellant will be deprived of its own, and the general creditors will receive that to which they have no right.' "

In the case of *American Sugar Refining Co.* v. *Fancher,* 145 N. Y., 552; 40 N. E., 206, 208, it was said:

"An assignee for creditors is not a purchaser for value, and stands in no other or better position than his assignor as respects a remedy to reach the proceeds of the sales by Burkhalter & Co. *Goodwin* v. *Wertheimer,* 99 N. Y., 149, 1 N. E., 404; *Barnard* v. *Campbell,* 58 N. Y., 76; *Ratcliffe* v. *Sangton,* 18 Md., 383; *Bussing* v. *Rice,* 2 Cush., 48. It is claimed that the general creditors of the firm will be prejudiced if

the plaintiff is allowed to prevail, and that he will thereby acquire a preference over the other creditors of the insolvent firm. But general creditors have no equity or right to have appropriated to the payment of their debts the property of the plaintiff, or property to which it is equitably entitled as between it and Burkhalter & Co.

They, so far as appears, advanced nothing, and gave no credit on the faith of the firm's possession of the sugars, assuming that that element would have had any bearing on the case. *If the sugars had existed in specie in the hands of the assignee, it cannot be doubted that the plaintiff on rescinding the sale would have been entitled to retake them, and the general creditors are in no worse position, if the plaintiff is awarded the proceeds, than they would have been if the sugars had remained unsold."*

So, also, in our case, if Gorman's 250 shares of stock be now given to him, the general creditors will be in no worse position than they would have been had Brown & Co., the bankrupts, never made the substitution of certificates. The argument of appellee is based upon technical form and attempts to conceal the real substance of this case.

But, as was said by Justice Brewer, in *Hurley* v. *A. T. & S. F. Ry.*, 213 U. S., 134:

*"Equity looks at the substance and not at the form. * * * The equitable rights of the parties were not changed by the commencement of bankruptcy proceedings. All obligations of a legal and equitable nature remained undisturbed thereby."*

Of course there can be no doubt that James E. Gorman at any time prior to the bankruptcy could have demanded of the firm of A. O.

Brown & Co. the certificates of stock evidencing his ownership in 250 shares of the capital stock and A. O. Brown & Co. could not have declined to turn over the stock. It follows that when A. O. Brown & Co. were adjudicated bankrupts their trustee had no better rights than the bankrupts themselves. In other words the trustee in bankruptcy takes the property in the same plight and condition that it was in the hands of the bankrupt and subject to equities.

Richardson v. *Shaw*, 209 U. S., 378.
Security Warehousing Co. v. *Hand*, 206 U. S., 415, 423.
Thompson v. *Fairbanks*, 196 U. S., 516, 526.
Humphrey v. *Tatman*, 198 U. S., 91.
York Manfg. Co. v. *Cassell*, 201 U. S., 344, 352.
Hauselt v. *Harrison*, 105 U. S., 401.

Certainly Gorman has an equitable lien on 250 shares of Green Cananea stock in the hands of the trustee-appellee, which neither the bankruptcy law nor the right of general creditors can disturb.

Hurley v. *A. T. & S. F. Ry. Co.*, 213 U. S., 126, 131 to 135.
Sexton v. *Kessler*, 225 U. S., 90, 98, 99.

In the recent case of *Sexton* v. *Kessler*, 225 U. S., 90, which is similar in principle to the case at bar, Mr. Justice Holmes said, on pp. 97, 98-99:

> "So the question is whether anything in the situation of fact or the rights reserved prevents the intended creation of a right *in rem*, or at least one that is to be preferred to the claim of the trustee.

The Bankruptcy Law itself does not avoid the transaction (*Thompson* v. *Fairbanks*, 196 U. S., 516; *Humphrey* v. *Tatman*, 198 U. S., 91, 95). A trustee in bankruptcy does not stand like an attaching creditor; he gets no lien by the mere fact of his appointment (*York Mfg. Co.* v. *Cassell*, 201 U. S., 344; *Zartman* v. *First National Bank of Waterloo*, 216 U. S., 134, 138).

* * * * *

There can be no doubt, as was said by the court below, that before the bankruptcy the English house had an equitable right at least to possession, if it wanted it. While the phrase 'equitable lien' may not carry the reasons further or do much more than express the opinoin of the court that the facts give a priority to the party said to have it, we are of opinion that the agreement created such a lien at least, or, in other words, that there is no rule of local or general law that takes from the transaction the effect it was intended to produce (*Hurley* v. *Atchison, Topeka & Santa Fe R'y.*, 213 U. S., 126, 134). When the English firm took the securities it only exercised a right that had been created long before the bankruptcy and in good faith. Such we understand to be the law of New York, and in the absence of any controlling statute to the contrary such we understand to be what the law should be (*Parshall* v. *Eggert*, 54 N. Y., 18; *Nat. Bank of Deposit* v. *Rogers*, 166 N. Y., 380).

Decree affirmed."

Conclusion.

The last analysis of the case then is that on April 14, 1908, A. O. Brown & Co. purchased for James E. Gorman, and held for him as trustees, 250 shares of the capital stock of the Greene Cananea Copper Company; that monthly from the time of purchase

to the date of the suspension of the firm statements were sent to Mr. Gorman by A. O. Brown & Co., advising him that they were holding 250 shares of Greene Cananea Copper stock for him; that there were no earmarks about the shares of stock; that on the date of purchase A. O. Brown & Co. put 250 shares of that stock into a big tin box; that they always considered that they had 250 shares of Gorman's stock in that box; that when the same tin box came into the hands of the receiver-trustee it contained 350 shares of Greene Cananea stock, against which no claim is made by any other customer and which it is not contended ever stood in the name of A. O. Brown & Co. It follows that James E. Gorman, rather than the general creditors, is entitled to 250 of said shares of stock and that the order and judgment of the District Court, setting aside the recommendations of the Referee as Special Master, were erroneous.

The order, judgment and decree of the United States Circuit Court of Appeals for the Second Circuit affirming the order, judgment and decree of the District Court of the United States for the Southern District of New York, setting aside as to 250 shares of the Greene Cananea stock the recommendations of the Referee as Special Master should be reversed, and the recommendations of the Referee as Special Master should be affirmed.

As to Costs.

All costs should be assessed against the trustee-appellee, as appellant has been put to enormous ex-

pense to secure a plain right. This contest has been made expensive by the Trustee in Bankruptcy representing the general creditors. At all times said trustee compelled Gorman to make detailed proof. (See Trustee's General Denial on Rec., 11.) The Trustee should therefore pay us our costs of securing Gorman's property, especially since said property was claimed for the benefit of general creditors. Under the facts in this case it would have been unconscionable for the creditors to have received Gorman's property. All doubt as to the right of the Trustee in Bankruptcy to restore to Gorman his stock was removed by the decision in *Richardson* v. *Shaw*, 209 U. S., 365, which was decided on April 6, 1908, eight days before Gorman purchased his stock, four months before the bankruptcy, seven months before Gorman made his claim, and one year and seven months before the Referee found in Gorman's favor. In all equity the appellee should pay us our taxable costs.

Respectfully submitted,

ROBERT DUNLAP,
JAMES L. COLEMAN,
Solicitors for Appellant—Intervening Petitioner.

Supreme Court of the United States,

OCTOBER TERM, 1913.

No. 243.

JAMES E. GORMAN,

Appellant,

vs.

CHARLES E. LITTLEFIELD, TRUSTEE IN BANKRUPTCY OF ALBERT O. BROWN ET AL., COPARTNERS, TRADING UNDER THE NAME OF A. O. BROWN & COMPANY,

Appellee.

BRIEF OF APPELLEE-RESPONDENT.

DANIEL P. HAYS,
RALPH WOLF,
Solicitors for Appellee-Respondent.

BYRNE PORT JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1912.

No. 243.

JAMES E. GORMAN,
Appellant,

vs.

CHARLES E. LITTLEFIELD, Trustee in Bankruptcy of ALBERT O. BROWN *et al.*, copartners, trading under the name of A. O. BROWN & COMPANY,
Appellee.

BRIEF OF APPELLEE-RESPONDENT.

The appellant filed his intervening petition for an order directing the receiver, afterwards elected trustee, to deliver to the appellant certain certificates of stock of the Chicago Subway Company and Green Cananea Copper Company.

The petition was granted as to the Chicago Subway stock, as to which there never was any opposition on the part of the trustee. So that this appeal relates solely to the right of the petitioner to the shares of Green Cananea Copper Company stock.

The facts in regard to the copper stock claimed

by the appellant are simple, and may be very briefly stated.

On April 14, 1908, the bankrupts, at the request of the appellant, purchased 100 shares of copper stock from Clark Dodge & Co., and received, for the account of appellant, certificate A-335. This certificate was thereafter, on May 6, 1908, delivered by the bankrupts on account of a sale made by them for another customer.

On April 14, 1908, the bankrupts, at the request of the appellant, purchased an additional fifty shares of said copper stock from C. H. Schott, and received, for the account of appellant, certificate Y-11083. This certificate was thereafter, on May 14, 1908, delivered to DeCoppet & Doremus, on account of a balance of trade between said firm and the bankrupts.

On April 14, 1908, the bankrupts, at the request of the appellant, purchased an additional fifty shares of said copper stock from Schott & Co., and received certificate B-6589. This certificate was thereafter delivered to DeCoppet & Doremus on April 16, 1908, on account of a sale for L. E. Gorton, of Detroit, Michigan.

On April 14, 1908, the bankrupts, at the request of appellant, purchased an additional fifty shares of copper stock from Wrenn Bros., and received certificate B-6537. This certificate was thereafter delivered to Carpenter & Baggott, on May 14, 1908, on account of a sale of Person, Snyder & Co., of Cleveland, Ohio (Record, p. 35).

The record therefore shows that on April 14, 1908, the bankrupts, at the request of appellant, purchased for the appellant 250 shares of Green Cananea Copper Company stock, and received, for and on behalf of the appellant, certain specific certificates of stock, aggregating 250 shares.

The 250 shares of stock so purchased by the bankrupts for the appellant thereby became the appellant's property. The appellant's said stock, after the purchase thereof, was converted by the bank-

rupts in the manner above stated, at various times between April 14, 1908, and May 14, 1908.

A. O. Brown & Co. were petitioned into bankruptcy on August 28, 1908. A receiver was thereafter appointed.

The above facts were duly found by the Master as follows:

> "On or about April 14, 1908, he directed the Chicago office to buy 250 shares of Green Cananea Copper stock. * * *
>
> The testimony of Mr. Wolf satisfies me that the particular certificates delivered to the firm under the purchase made for the account of tho claimant, were thereafter delivered in completion of other oustanding contracts of sale of the same stock for other customers of the firm.
>
> * * * * *
>
> With regard to the Green Cananea Copper stock, it appears affirmatively that the particular certificates delivered to the firm for the account of the claimant at the date of the original purchase, in April, 1908, were delivered to third parties by the firm in completion of outstanding contracts with those parties" (Record, pp. 83-84).

The appellant did not trace into the possession of the receiver or trustee any sums obtained by the bankrupts by reason of the conversion of the 250 shares of Copper stock, purchased by the bankrupts for the appellant. Nor is there any claim made that such proceeds were so traced.

Appellant merely proved that after bankruptcy there came into the possession of the receiver 350 shares of Cananea Copper Stock, which, however, were not identified in any way as being appellant's property.

POINT I.

The burden was upon the appellant to prove that his stocks, or the proceeds thereof, came into the possession of the receiver or trustee. Appellant can not establish title to specific certificates of stock found after bankruptcy unless he identifies those certificates as having been purchased for him.

The appellant is attempting to maintain a lien on, or establish ownership of, a fund in the possession of the Court, through its receiver or trustee.

The claim of the appellant is adverse to that of the general creditors. It is, of course, clear that the burden of proof was upon the appellant to show that his stocks, or the proceeds thereof, came into the possession of the receiver or trustee.

First National Bank v. *Littlefield*, 226 U. S., p. 110 (a decision in this bankruptcy proceeding).

Peters v. *Bain*, 133 U. S., 670.

The appellant can not establish title to the specific 350 shares of Copper stock found after bankruptcy unless he identifies such certificates as having been purchased for him. This appellant has not done.

Bank v. *Littlefield, supra.*

Peter v. *Bains, supra.*

Empire State Surety Co. vs. *Carroll County*, 194 Fed. Rep., 593 (C. C. A., per Sanborn, *C. J.*).

Board of Commissioners vs. *Strawn*, 157 Fed. Rep., 49 (C. C. A., per Lurton, *C. J.*).

NOTE.—Italics in quotations are ours.

City Bank vs. *Blackmore*, 75 Fed Rep., 771 (C. C. A., per Taft, *C. J.*).
In re Hicks, 170 N. Y., 195.
Lowe vs. *Jones*, 192 Mass., 94.
See also other cases cited and quoted from under Point III hereof.

The United Circuit Court of Appeals for the Second Circuit has uniformly applied this rule in determining the rights of owners reclaiming stocks from a receiver in bankruptcy of a brokerage firm.

In *In re Berry*, 149 Fed. Rep., 176, the report of the Special Master was affirmed by the District Court and by the Circuit Court of Appeals. It was also affirmed in this Court as *Thomas* vs. *Taggart*, 209 U. S., 385.

Among other things, the Master stated, in his report concerning the claim of one Little, which he refused to allow, as follows:

> "I am constrained to find that the claimant has not sufficiently identified the certificate for ten shares sold by the Hanover Bank, as his property. This is absolutely essential to enable him to follow the stock into the pledgee's hands.
>
> When the firm has so mingled the stock bought for customers with others, that no identification is possible, a claimant cannot insist that a particular certificate belongs to him *merely from the fact* that the firm had in its possession one or more certificates *for the same number of shares.*"

In *In re McIntyre*, 181 Fed. Rep., 960, the Court said, per LACOMBE, *C. J.*:

> "Bankrupts bought 200 shares of a certain stock for a customer. They did not keep this stock, but used it as they would their own in the general transaction of their business. They did the same with other customers who had bought like stock. When they failed there were ninety-five shares of this kind of stock among the Bank of Commerce collateral,

> ten shares were pledged on another loan, and there were two shares in their vault. They owed their customers 1,651 shares of this variety of stock. We cannot find from the record *any satisfactory identification* of the ninety-five shares (or any of them) as being those bought for this particular customer, other than those bought for some one else. He * * * is not entitled to the certificates.
>
> "We also concur in the conclusion of the District Judge that persons whose stock has been used by a bankrupt for his own purposes, cannot establish title to *specific certificates* of stock found after bankruptcy as collateral to some loan, unless they *identify* those certificate as representing the shares which the bankrupt took from the claimant." (Italics ours.)

This language was used in connection with the claim of Talbot and other claimants. The underlying facts of the Talbot claim, as will appear from the Special Master's report, were, that Talbot claimed to be the owner of 100 shares of Iowa Central Railroad Company preferred stock. "At the time of the failure, McIntyre & Co., owed in all to their customers 200 shares of Iowa Central Railroad Company preferred stock – to the claimant Talbot 100 shares, and to an account called 'No. 1 Special,' 100 shares. *No other claim* than that of Talbot for Iowa Central Railroad Company stock has been made." The Bank returned to the trustee, upon the liquidation, 200 shares of Iowa Central stock. The claim of Talbot was, however, dismissed by the Special Master, in a careful decision, which dismissal was affirmed successively by Judge Hough, *D. J.*, and the learned Circuit Court of Appeals (see report of Special Master, printed in full in *Re McIntyre & Co.*, 24 A. B. R., 4 and 20).

See also

In re A. O. Brown & Co., 185 Fed. Rep., 766;

In re Ennis, 187 Fed. Rep., 728;

In re A. O. Brown & Co., 193 Fed. Rep., 30;
In re A. O. Brown & Co., 193 Fed. Rep., 24.

In the case last cited, the Court said, per LACOMBE, *C. J.*:

"As we said in *Re* McIntyre, Grace's Appeal, 185 Fed., 96, 108, C. C. A., 543:

'While the doctrine of following trust funds has been much extended in the modern decisions, there has never been a departure in the *federal courts* from the principle that there must be some identification of the property sought to be charged with the trust funds.'

"We have here a firm of brokers in failing circumstances, who have converted and sold the stocks of very many of their customers. It seems *a violent presumption* to assume that throughout their subsequent transactions with their banks they are continually manipulating their funds so as to keep the moneys they have misappropriated segregated and intact. So far as concerns the fund which came to the trustee as unexpended balance ($2,055.97) of the bankrupts in their account with the Hanover Bank, the $1,120 of this claimant's money *has not been identified* as constituting any part of it."

At page 26:

"We are not prepared to assent to the proposition that *subsequent deposits* are to be taken as having been made *to make good* claimant's money thus drawn and spent. Board of Commissioners *vs.* Strawn, 157 Fed., 51, 84 C. C. A., 553, 15 L. R. A. (N. L. S.), 1100."

At page 29:

"No doubt the individual whose property has been converted has a high equity and is entitled to certain well-settled presumptions; but we cannot assent to the proposition that

> he may *trace* his money into any specific fund or security *merely by inferences based on presumptions without substantive testimony to sustain them. The burden of proof* is on the claimant at the outset; it rests upon him at the close of the case. If he has not, then, upon the whole proof, *made clear the final resting place* of his *converted property or its substitute,* he cannot sustain his claim."

In re A. O. Brown & Co., 193 Fed. Rep., 24, was appealed to this Court, and was affirmed (see *First National Bank of Princeton* vs. *Littlefield*, 226 U. S., [illegible] 110

The decisions of the United States Circuit Court of Appeals for the Second Circuit, above referred to, should have great weight with this Court, for the reason that said Court has occasion to decide more frequently that any other court, questions respecting rights of customers of a failed brokerage firm. That court is situated in the Circuit in which the greatest volume of stock transaction takes place.

POINT II.

The District Court and the Circuit Court of Appeals have held that the appellant has failed to prove that his stock, or the proceeds thereof, came into the possession of the receiver or trustee. This concurrent finding of two courts will not be disturbed except in case of manifest error.

All of the arguments of the appellant are really based upon the proposition that the District Court and the Circuit Court of Appeals erred in their appreciation of the facts.

As we have shown, the Master found that

> "the particular certificates delivered to the firm under the purchases made for the ac-

> count of the claimant were thereafter delivered in completion of other outstanding contracts of sale of the same stock for other customers of the firm (bankrupts).
>
> * * * * *
>
> It appears affirmatively that the particular certificates delivered to the firm for the account of the claimant at the date of the original purchases, in April, 1908, were delivered to third parties by the firm in completion of outstanding contracts with those parties" (Record, pp. 83, 84).

Here, we have the findings of the Master, approved by the District Court and by the Circuit Court of Appeals, to the effect that certain particular certificates of stock, identified in the record, were delivered to the bankrupts pursuant to purchases made for the account of the appellant. These certificates, which thereby became the property of the appellant, were thereafter delivered to third parties by the bankrupts, in completion of outstanding contracts with those parties, and thus converted.

The whole argument of the appellant is built upon the proposition that no particular certificates were ever purchased for the appellant, and that he never became the owner of any particular certificates. But we have the findings of the Master that certain particular certificates were purchased for appellant, and delivered to the bankrupts for his account. And we have shown that the particular certificates which became the property of the appellant were converted by the bankrupts long prior to the receivership.

There is, in this view of the record, admittedly no evidence that the appellant's stock or the proceeds thereof came into the possession of the receiver or trustee.

These are findings of fact concurred in by the District Court and the Circuit Court of Appeals, that appellant's certain and specific certificates of stock were converted by the bankrupts long prior

to their bankruptcy, and that neither said specific certificates of stock nor the proceeds thereof came into the possession of the receiver or trustee.

The concurrent action of two courts upon questions of fact will not be disturbed, except in case of manifest error, a condition which does not here obtain.

First Natl. Bank of Princeton vs. *Littlefield*, 226 U. S., [illegible] 110
Brainerd v. *Buck*, 184 U. S., 99.
Stuart v. *Hayden*, 169 U. S., 1.

These findings of fact, unless reversed by this Court, effectually dispose of appellant's claim.

POINT III.

The mere fact that there came into the possession of the Receiver 350 shares of Green Cananea Copper stock, does not, without further proof, entitle the appellant thereto.

Appellant relies upon the fact that there came into the possession of the receiver 350 shares of Green Cananea Copper stock, which were not attempted to be recovered by any reclaiming creditor. But the appellant failed to show that the 350 shares which came into the receiver's possession were acquired by the bankrupts in replacing the 250 shares of appellant's stock which the bankrupts converted; nor is there any proof when, where, or how the bankrupts acquired the 350 shares which ultimately came into the possession of the receiver. *Non constat*, but that it was acquired long before the purchase of appellant's copper stock, or long after the conversion, and at a time when bankrupts had no such copper stock.

Non constat, but that it was purchased for other customers.

The appellant merely proved the bald fact that there came into the receiver's possession 350 shares of Green Cananea Copper stock, which no reclaiming creditor had sought to obtain.

It may be that other persons were entitled to maintain such reclamation proceeding, and refrained from taking such proceeding because of unfamiliarity with the practice, or because of an unwillingness to indulge in litigation, or some other reason.

So the situation presented by the record is this: Appellant merely showed that there came into the possession of the receiver some 350 shares of this copper stock, and nothing more. It may very well be that the bankrupts purchased the 350 shares which came into the possession of the receiver only shortly prior to the bankruptcy.

In these circumstances it cannot be held that appellant has made out a case which entitles him to a return of 250 shares of Green Cananea Copper stock.

The case presented is no different than if the appellant were attempting to establish ownership of a trust fund of money or other trust property entrusted to the bankrupts. It would not be enough to show that the receiver received moneys more in amount than his trust moneys, or other property of the same kind as the trust property. He must go further, and prove more than a similiarity of kind; he must prove that his identical money or property came into the possession of the receiver or trustee. Merely showing that more money than his trust money or property of a similar kind to his trust property came into the possession of the receiver or trustee is not enough.

> "Persons whose stock has been used by a bankrupt for his own purposes cannot establish title to specific certificates of stock found after bankruptcy, unless they identify those certifi-

cates as representing the shares which the bankrupt took from the claimant."

In re McIntyre, 181 Fed. Rep., 960.

Such has been the uniform holding of the United States Circuit Court of Appeals for the Second Circuit in brokerage receiverships. We have quoted in Point I hereof, from the authorities in full (see following authorities quoted from in Point I hereof):

In re Berry, 149 Fed. Rep., 176; affirmed in this Court as *Thomas* v. *Taggart*, 209 U. S., 385.
In re McIntyre, 181 Fed. Rep., 960.
In re A. O. Brown, 185 Fed. Rep., 766.
In re Ennis, 187 Fed. Rep., 728.
In re A. O. Brown, 193 Fed. Rep., 38.
In re A. O. Brown, 193 Fed. Rep., 24.

In *Peters* vs. *Bain*, 133 U. S., 670, the Court said:

"The same difficulty presents itself here and while the rule laid down by Mr. Justice Bradley has been recognized by this Court (Baltimore Central National Bank *vs.* Connecticut Mutual Life Ins. Co., 104 U. S., 67, and cases cited), yet, as stated by the Chief Justice, 'purchases made and paid for out of the general mass cannot be claimed by the Bank, unless it is shown that its own moneys then in the fund were appropriated for that purpose."

In *Board of Commissioners* vs. *Strawn*, 157 Fed. Rep., 49, the Circuit Court of Appeals, per Lurton, *J.*, said, at page 54:

"To impress a trust upon the property of a tort-feasor who has used the trust fund in his private affairs, it must be traced in its original shape or substituted form. City Bank *vs.* Blackmore, 75 Fed. Rep., 771, and other cases cited, are cases decided by this court, which recognize that the mere misapplication of a trust fund does not create a general lien upon the tort-feasor's estate. In other courts,

> the question has been presented more squarely for a decision, and supports the rule that an identification of the fund itself, or a tracing into some specific property, is essential to reach the property of a wrongdoer, either in the hands of an assignee, trustee, receiver, or under a lien fastened by creditor." (Citing many cases.)

In re Hicks, 170 N. Y., 195, the Court said, per Cullen, *J.*, at page 198:

> "But it is the general rule, as well in a court of equity as in a court of law, that in order to follow trust funds and subject them to the operation of the trust, they must be identified. * * *
>
> "A presumption, without any proof to support it, can no more be indulged in in favor of the respondent's claim than in favor of that of any of the other creditors. To do so would in effect be simply holding that because the plaintiff's claim is for a breach of trust it is entitled to a preference."

In *Lowe* vs. *Jones*, 192 Mass., 494, the Court said, per KNOWLTON, *C. J.*, at page 489:

> "In some states it is held that, while it is not enough to show that trust property went into the general assets, it is enough to charge the whole estate with a trust, if it can be shown that the proceeds remain unexpended somewhere in the estate.
>
> * * * * *
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> But, by the great weight of the authority, a trust cannot be established against the proceeds of trust property which has been disposed of, unless the proceeds can be identified and traced into some specific fund or property. This is the doctrine of Re Hallett, to which we have already referred. In the latter case of Re Hallett (1894) 2 Q. B. 237, 244, it was said in the opinion: 'There is *nothing* in our decision in the present case which is *in conflict* with the decision in Re Hallett, *L. R. 13 Ch. Div. 696*. In order to follow trust money there must be specific property,

capable of being identified, into which the money has been converted; and in that case this doctrine was applied in this way. It was said that where a trustee pays his own money and also trust money in his banking account, it is the same thing as though he had placed them in a box, and his drawing for his own purposes must be assumed to be out of his own money. That decision in no way qualifies the rule that that there must be a specific thing capable of being followed.' See also *Re Stenning* (1895), 2 Ch., 433; *Re Oatway* (1903), 2 Ch. 356. The rule in Massachusetts has always been held, with considerable strictness, to require the identification of the trust property as passing into some other specific property or fund, as distinguished from the general assets of one's estate. Howard *vs.* Fay, 138 Mass., 103; Atty. Gen. *vs.* Brigham, 142 Mass., 248, 7 N. E., 851. In Little *vs.* Chadwick, 151 Mass., 109, 7 L. R. A., 570, 23 N. E., 1005, this Court said: 'When trust money becomes so mixed up with the trustee's individual funds that it is impossible to trace and identify it as entering into some specific property, the trust ceases. The Court will go as far as it can in thus tracing and following trust money, but when, as a matter of fact, it cannot be traced, the equitable right of the *cestui que trust* to follow it fails. * * * *There is nothing to the contrary in Central Nat. Bank* vs. *Connecticut Mutual L. Ins. Co.*, 104 U. S. 54, 66, 71, 26 L. ed. 693, 699, 700, and in *Re Hallett, L. R. 13 Ch. Div. 696, 708, 721.*'"

At page 490:

"In the settlement of an insolvent estate there would be but little equity in preferring this kind of claim, as against other creditors some of whose claims might be just as meritorious and founded on as great a violation of private rights as that of the *cestui que trust.* Except in cases of the insolvency of the trustee, the right to establish a trust against his estate is of no consequence, for all that could be obtained in such a case would be the value of the trust property, or its proceeds, and that

> can always be collected of the trustee if he is solvent. For different reasons, we think the rule stated in Little *vs* Chadwick, *ubi supra*, should be followed, and that a trust should not be declared against the insolvent estate of a deceased person on the ground that the proceeds of trust property went into the general assets, and thereby increased the amount in the hands of the administrator."

Empire State Surety Co. vs. *Carroll County*, 194 Fed. Rep., 593 (C. C. A., 8th Circuit). At page 604 the Court said, per SANBORN, *C. J.*:

> "It is indispensable to the maintenance by a *cestui que trust* of a claim to preferential payment by a receiver out of the proceeds of the estate of an insolvent that *clear proof* be made that the trust property or its proceeds went into a *specific fund* or into a specific identified piece of property which came into the hands of the receiver, and then the claim can be sustained to that fund or property only, and only to the extent that the trust property or its proceeds went into it. It is not sufficient to prove that the trust property or its proceeds went into the general assets of the insolvent estate and increased the amount and the value thereof which came to the hands of the receiver."

If the decree of the Court below is reversed, a new method will be added to the Bankruptcy Act for the distribution of the estate of an insolvent brokerage firm. There will be nothing left to distribute to general creditors. For example, all Southern Pacific Railroad stock coming into the possession of the receiver would be reclaimed by and distributed among the creditors of the firm owning or carrying said stock; and continuing with this method, every share of stock in the trustee's hands would be distributed among the customers owning or carrying the shares of stock proportionately as their interests might appear. No shares

would be left in the trustee's hands for distribution among general creditors.

Owing to the nature of the business of the bankrupts, all of the assets in the hands of the trustee would be thus probably distributed,—a result certainly contrary to the spirit and intent of the Bankruptcy Act.

POINT IV.

The authorities relied upon by appellant are not in point.

Much is made of *Richardson* vs. *Shaw*, 209 U. S., 365, and cases therein cited.

It will be seen that in that case Richardson, as trustee in bankruptcy, sought to set aside, as an illegal preference, the delivery to Brown's customer, Shaw, stock purchased by Shaw on margin, when Shaw, after the insolvency, tendered the amount of his debt to Brown.

The language of the court in *Richardson* vs. *Shaw*, "that the certificate is not the property itself but the evidence of property in the shares," was used with reference to the particular facts in that case, which was an action to set aside an illegal preference.

The brokers themselves, prior to their bankruptcy, recognized the customers' rights to the securities returned, which the court referred to in its opinion as follows:

> "When Young, the agent of Shaw & Co., demanded the stocks, their right of ownership in them was recognized, and while pledged they were under the control of the broker, were promptly redeemed and turned over to the customer."

The broker thus recognized that he was returning to the customer his property.

Of course, the fact that the certificates so returned were not the identical certificates which had been originally purchased by the broker for the account of the customer was immaterial, because the ownership of the customer in the shares of stock was conceded by the broker and the giving of the certificates to the customer was merely a method of investing him with the legal evidence of his title to the shares.

The questions involved in the case at bar as to the right of a claimant to recover shares of stock from a trustee in bankruptcy, without any proof as to his ownership of the particular shares sought to be recovered and after it had been found by the Master that his particular shares of stock had been converted by the brokers, was not before the Court.

So that the fundamental question decided in that case is entirely different from the one involved in the case at bar.

Richardson vs. *Shaw* ought properly be considered with *Thomas* vs. *Taggart*, 209 U. S., 385, decided at the same time.

Thomas vs. *Taggart*, affirmed *In re Berry*, 149 Fed., 176, decided by the United States Court of Appeals for the Second Circuit.

Mrs. Taggart was, by the report of the Special Master, awarded certificates numbered A-30563 for 33 shares of stock, and C-15546 for 50 shares of stock. These two specific securities were traced into a specific fund, which came into the hands of the receiver and trustee. The identification was likewise complete in the case of the other successful claimants.

In his report, the Special Master, in dismissing certain claims of unsuccessful claimants, said:

> "I am constrained to find that the claimant has not sufficiently identified the certificates for 10 shares sold by the Hanover National Bank as his property. This is absolutely

> essential to enable him to follow the stock into the pledgee's hands. When a firm has certificates mingled with stock bought by customers, with others, so that no identification is possible, the claimant cannot insist that the particular certificate belongs to him merely from the fact that the firm had in their possession one or more certificates for the same number of shares."

As we have shown, the report of the Special Master was affirmed by the Circuit Court of Appeals, and then by this Court.

In deciding *Thomas* vs. *Taggart*, Mr. Justice Day refers to the case of *Richardson* vs. *Shaw*.

It is therefore apparent that *Richardson* vs. *Shaw* is not an authority upon the questions here presented, but that *Thomas* vs. *Taggart* is.

POINT V.

The decree of the Circuit Court of Appeals should be affirmed, with costs.

Respectfully submitted,

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(7330L)